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AGE DISCRIMINATION IN EMPLOYMENT ACT—WAIVER OF RIGHTS

HEARING

BEFORE THE

SUBCOMMITTEE ON LABOR

OF THE

COMMITTEE ON

LABOR AND HUMAN RESOURCES

UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

REVIEWING THE WAIVER OF RIGHTS PROVISIONS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

MAY 24, 1988

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AGE DISCRIMINATION IN EMPLOYMENT ACT—WAIVER OF RIGHTS

TUESDAY, MAY 24, 1988

U.S. Senate,
Subcommittee on Labor,
Committee on Labor and Human Resources,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room SD-430, Dirksen Senate Office Building, Senator Howard Metzenbaum (chairman of the subcommittee) presiding.

Present: Senators Metzenbaum and Stafford.

Also present: Senator Melcher.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator **Metzenbaum**. The Labor Subcommittee of the Labor and Human Resources Committee will come to order.

I have called today's hearing to examine the issue of waiver of rights under the ADEA, or Age Discrimination in Employment Act.

Today, we see new trends developing in the area of voluntary retirement. American employers increasingly rely on early retirement and other exit incentive programs. They do this to reduce their work force, oftentimes so that they may respond to global competition, merger activity, and other practices.

If properly structured, these incentive programs may be beneficial to employees and employers alike; but some exit incentive programs may violate the law if they discriminate against older workers in their plan or implementation.

One area of serious potential abuse involves the use of waivers. Last summer, the Equal Employment Opportunity Commission issued a rule permitting employees to waive their rights under the ADEA without Federal supervision. Congress immediately expressed grave doubts about that rule as a matter of law and public policy. By a unanimous vote, both Houses of Congress passed an amendment to suspend the rule for one year so we could examine the need for and the legality of such a rule. Today's hearing fulfills our promise to review this important issue.

As chairman of this subcommittee, I am troubled by the message that the EEOC is sending, that the Federal Government is prepared to abandon the civil rights of older workers. We will not permit that to happen. We will not tolerate discrimination against our senior citizens.

The EEOC rule would permit unsupervised waivers for employees who have not filed a charge and who are not involved in any dispute with their employer. These employees have no reason to be on guard to protect their rights. Indeed, they often will not even know until months after they waive their rights whether in fact they were victims of age discrimination. By then, of course, it is too late.

Apart from turning its back on older workers, the EEOC may well be ignoring the true interest of employers. We already know that employers have independent economic reasons for wanting to reduce their work forces through voluntary incentive plans.

Relying on published reports, my staff has contacted representatives of more than a dozen major American companies that have implemented early retirement incentive or other voluntary work force reduction programs in recent years. We found that the overwhelming majority of companies do not seek waivers at all.

Since 1985, more than 13,000 workers were part of a voluntary reduction in force at IBM. In the same time period, 11,000 workers voluntarily departed at Du Pont; 16,500 at AT&T; 6,000 at Phillips Petroleum; 3,500 at Union Carbide; 1,600 at Hewlett-Packard; 650 at Polaroid; 600 at Mellon Bank; and 600 at CBS. None of these companies—and they are just a sample—asked their employees to waive their rights as a prerequisite to participating in the program. Indeed, one top corporate official stated that waivers could undermine the atmosphere of good will that is essential to such a voluntary program. He explained that the waiver request could discourage participation by arousing needless suspicions among employees.

A large number of employers exercise economic common sense by treating older workers humanely. Unfortunately, there are others who force employees to sign waivers as a condition of their departure. We will hear several employees describe their experiences with waivers—experiences that robbed them of their dignity as well as their rights under Federal law.

We will also hear this morning from the EEOC. I hope this hearing will initiate a constructive dialogue on the waiver issue. Finally, we will hear from the American Association of Retired Persons, the Chamber of Commerce, and a former Solicitor of Labor who served when the ADEA was administered by the Department of Labor.

We are particularly pleased that we will hear this morning from the Honorable John Melcher, Senator from the State of Montana and chairman of the Special Committee on Aging. We are very happy to welcome you, Senator Melcher.

STATEMENT OF HON. JOHN MELCHER, A U.S. SENATOR FROM THE STATE OF MONTANA, AND CHAIRMAN, SPECIAL COMMITTEE ON AGING

Senator **Melcher**. Thank you very much, Mr. Chairman, and thank you for holding this hearing; it is most timely.

I am here to testify that, notwithstanding what the Equal Employment Opportunity Commission has been saying and attempting, we should maintain the requirement that valid waivers require supervision by the ECOC. Here is my reason for taking that stand, Mr. Chairman:

If we look back when the Age Discrimination in Employment Act was first signed into law, Congress expressly incorporated certain enforcement provisions of the Fair Labor Standards Act. Included in those enforcement provisions is a requirement that a waiver of an employee's rights be supervised in order to be considered valid. The obvious purpose of these provisions is to help protect the rights of older Americans under the Age Discrimination in Employment Act.

Nevertheless, despite this obvious congressional intent, in August of last year, the EEOC issued in final form a rule allowing for unsupervised waivers. That action occurred just prior to a hearing I held in the Special Committee on Aging on EEOC enforcement of the Age Discrimination in Employment Act.

At that hearing, I heard from representatives of senior citizens groups and labor organizations, all of whom spoke out against the EEOC rule. Now, this wasn't their only testimony, but they made it clear that they were opposed to the Commission's rule.

Another witness on this issue was a former steel company worker who began as a laborer at his former company and eventually worked his way up to a management position. In 1982, he, along with many of the company's older workers, were laid off—even while younger workers were being trained to take their place. Before he left, however, he was given a piece of paper to sign that waived his rights under the Age Discrimination in Employment Act.

What choice was he given? To sign and leave quietly with some of his pension, or to be laid off for 2 years and lose his health benefits. With this sort of a choice, it wasn't very surprising that he signed. He had worked 35 years for his company.

I don't think anyone knows for sure how many older Americans, who have worked for 30 or 40 years, have similar stories they could tell, or how many will in the future.

What we do know, however, is that mergers and takeovers and other kinds of resulting corporate restructuring are undermining job security. And, we know that early retirement incentive programs are becoming commonplace. At the same time, the numbers of older Americans are increasing at an unprecedented rate. With greater numbers of older men and women in the work place during these times of uncertainty, their rights under the ADEA—namely, not to be laid off, replaced, or passed over solely on the basis of age—run an all-time risk of being trampled.

The Equal Employment Opportunity Commission would have us believe that this rule would benefit older workers. Under the rule, only those waivers that were signed by older workers on a "knowing and voluntary" basis would be considered valid. While at first glance, this standard could appear to represent a safeguard against a sort of Hobson's Choice placed before that former steelworker back in 1982. But given the fact that many older workers are not aware of their rights under the ADEA, and, by definition, are typically and profoundly in unequal bargaining positions, this standard is vague and far from sufficient, in my view.

If we asked the average American what he or she thinks about waivers, in this town, at least, they would think of Redskins waivers. I think I read this morning where cornerback Tim Morrison is being traded rather than waived.

Well, we sports fans, or we Redskins fans in particular, understand what waivers mean for the Redskins. Sometimes they waive an older player, and we think that is all right. But this is only a sports team. This is a procedure which affects, in the case of Morrison, who is not yet 30 years old, a football player for a short period of their career in football. It is only part of their lives. They enter football with the intention of playing as long as they can. But then, after that time of their life is over, they go on into real life, into other pursuits.

Well, that's what much of the public thinks about waivers. They don't know about the kinds of waivers we are speaking about—today, those affecting people with a lifetime of work who may be turned loose, turned out, their jobs taken away from them, while signing a waiver without knowing what their rights are under the Age Discrimination in Employment Act. That's what we're talking about. We're talking about real life and about workers who may have given the best years of their lives to their company. Are they going to be just fired, displaced, turned loose, solely on the basis of their age? If so, that's contrary to law—a law that isn't new, a law that is about a generation old—the Age Discrimination in Employment Act—a law that deliberately, when passed by Congress, included some of the standards of the Fair Labor Act to protect workers against unsupervised waivers. Who is supposed to protect them? In this case, the Commission. Who wants to water down the rights of those employees? The Commission.

Should they be allowed to do so? I emphatically say no.

Mr. Chairman, it is unusual for me to testify before this Committee, but I do so because I believe that unless we take action and make sure that the law is enforced, or that the rule is appropriately modified, the rights of many older Americans may be ignored, may be trampled, and thus older Americans may not get the full protection of the law.

Mr. Chairman, I hope that this committee in its wisdom will make sure that we do maintain clear congressional intent and that any waivers are valid only if signed with proper supervision.

Mr. Chairman, I request that the full text of my opening statement be included in the record.

[The prepared statement of Senator Melcher follows:]

STATEMENT OF SENATOR JOHN MELCHER
CHAIRMAN, THE SENATE SPECIAL COMMITTEE ON AGING

BEFORE THE SENATE SUBCOMMITTEE ON LABOR
HEARING ON THE EEOC UNSUPERVISED WAIVER RULE

MAY 24, 1988

MR. CHAIRMAN, I WOULD LIKE FIRST OF ALL TO THANK YOU FOR PROVIDING ME WITH THIS OPPORTUNITY TO EXPRESS MY VIEWS ON THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S RULE WHICH WOULD ALLOW FOR WAIVERS OF THE RIGHTS OF OLDER WORKERS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT WITHOUT THE SUPERVISION OF THE EEOC. I AM DEEPLY CONCERNED ABOUT THIS RULE, WHICH I BELIEVE RUNS COUNTER TO THE SPIRIT AND THE INTENT OF THE A.D.E.A.

I ALSO WANT TO ADD THAT I WAS DELIGHTED THAT YOU JOINED WITH ME LAST YEAR IN OFFERING THE AMENDMENT WHICH BLOCKED THE RULE FROM GOING INTO EFFECT DURING THIS FISCAL YEAR. WITH MORE THAN HALF THE FISCAL YEAR ALREADY GONE, I AGREE THAT IT'S TIME TO REVISIT THIS ISSUE, AND I COMMEND YOU FOR HOLDING THIS TIMELY HEARING.

MORE THAN 20 YEARS AGO, WHEN THE A.D.E.A. WAS ENACTED INTO LAW THE CONGRESS EXPRESSLY INCORPORATED CERTAIN ENFORCEMENT PROVISIONS OF THE FAIR LABOR STANDARDS ACT. INCLUDED IN THOSE ENFORCEMENT PROVISIONS IS A REQUIREMENT THAT A WAIVER OF AN EMPLOYEE'S RIGHTS BE SUPERVISED IN ORDER TO BE CONSIDERED VALID. THE OBVIOUS PURPOSE OF THESE PROVISIONS IS TO HELP PROTECT THE RIGHTS OF OLDER WORKERS UNDER THE A.D.E.A.

NOTWITHSTANDING CONGRESSIONAL INTENT, IN AUGUST OF LAST YEAR, THE EEOC ISSUED IN FINAL FORM THE UNSUPERVISED WAIVER RULE. THIS ACTION OCCURRED JUST PRIOR TO A HEARING I HELD WHICH EXAMINED A RANGE OF ISSUES CONCERNING THE EEOC'S ENFORCEMENT OF THE A.D.E.A. AT THAT HEARING, I HEARD FROM REPRESENTATIVES OF SENIORS' AND LABOR ORGANIZATIONS -- ALL OF WHOM SPOKE OUT AGAINST THE EEOC RULE IN THE COURSE OF THEIR TESTIMONY.

HOWEVER, ONE OF THE MOST COMPELLING WITNESSES ON THIS ISSUE WAS A FORMER STEEL COMPANY WORKER, WHO BEGAN AS A LABORER AT HIS FORMER COMPANY AND, EVENTUALLY, WORKED HIS WAY UP TO A MANAGEMENT POSITION. IN 1982, HE, ALONG WITH MANY OF THE COMPANY'S OLDER WORKERS, WERE LAID OFF, EVEN WHILE YOUNGER WORKERS WERE BEING TRAINED TO TAKE THEIR PLACE. BEFORE HE LEFT, HOW HE [redacted]S WAS GIVEN A PIECE OF PAPER TO SIGN THAT WAIVED HIS RIGHTS UNDER THE A.D.E.A. HIS CHOICE: TO SIGN AND LEAVE QUIETLY WITH SOME OF HIS PENSION OR TO BE LAID OFF FOR TWO YEARS AND LOSE HIS HEALTH BENEFITS. NOT SURPRISINGLY, HE SIGNED. HE [redacted]. [redacted] HAD WORKED 35 YEARS FOR THE COMPANY.

NOW, I DON'T THINK ANYONE KNOWS FOR SURE HOW MANY OLDER WORKERS HAVE SIMILAR STORIES TO TELL. OR HOW MANY WILL IN THE FUTURE. WHAT WE DO KNOW IS THAT MERGERS, TAKEOVERS, AND OTHER KINDS OF RESULTING CORPORATE RESTRUCTURINGS ARE UNDERMINING JOB SECURITY. AND WE KNOW THAT EARLY RETIREMENT INCENTIVE PROGRAMS

ARE BECOMING COMMOMPLACE. AT THE SAME TIME, THE NUMBERS OF OLDER AMERICANS ARE INCREASING AT AN UNPRECEDENTED RATE. WITH GREATER NUMBERS OF OLDER MEN AND WOMEN IN THE WORKPLACE DURING THIS TURBULENT PERIOD, THEIR RIGHTS UNDER THE A.D.E.A. -- NAMELY, NOT TO BE LAID OFF, REPLACED, OR PASSED OVER SOLELY ON THE BASIS OF AGE -- RUN AN ALL-TIME RISK OF BEING TRAMPLED.

THE EEOC WOULD HAVE US BELIEVE THAT THIS RULE WOULD BENEFIT OLDER WORKERS. UNDER THE RULE, ONLY THOSE WAIVERS THAT WERE SIGNED BY OLDER WORKERS ON A "KNOWING AND VOLUNTARY" BASIS WOULD BE CONSIDERED VALID. AT FIRST GLANCE, THIS STANDARD COULD APPEAR TO REPRESENT A SAFEGUARD AGAINST THE SORT OF HOBSON'S CHOICE FACED BY THAT FORMER STEEL WORKER BACK IN 1982. BUT, GIVEN THE FACTS THAT MANY OLDER WORKERS ARE NOT AWARE OF THEIR RIGHTS UNDER THE A.D.E.A., OR BY DEFINITION THEY ARE TYPICALLY IN PROFOUNDLY UNEQUAL BARGAINING POSITIONS, THIS VAGUE STANDARD IS FAR FROM SUFFICIENT IN MY VIEW.

CONSIDER, FOR EXAMPLE, THE FINDINGS OF A LOU HARRIS POLL CONDUCTED IN THE EARLY EIGHTIES THAT ONLY TWO IN FIVE AMERICANS KNOW THAT THE LAW PROHIBITS MANDATORY RETIREMENT AND THAT AMONG THOSE BETWEEN 40 AND 70 -- THE AGE GROUP COVERED BY A.D.E.A. -- FEWER THAN ONE IN TWO HAVE ANY KNOWLEDGE OF THIS LAW. AND I UNDERSTAND FROM THE AARP THAT LITTLE HAS CHANGED IN THIS

REGARD. AGAINST THIS BACKGROUND, HOW CAN THE "KNOWING" STANDARD BE CONSIDERED A MEANINGFUL SAFEGUARD?

AS FOR THE "VOLUNTARY" CRITERION INCLUDED IN THE RULE, HOW ADEQUATE IS THIS STANDARD WHEN VIEWED AGAINST THE TREMENDOUS PRESSURE AN EMPLOYER -- ALONG WITH A FIRM'S LAWYERS AND PERSONNEL EXPERTS -- CAN BRING TO BEAR ON AN OLDER WORKER. WE'RE NOT TALKING ABOUT A LEVEL PLAYING FIELD HERE.

NOW, THE EEOC CLAIMS THAT THE RULE WOULD EXPEDITE NEGOTIATIONS BETWEEN AN OLDER WORKER AND EMPLOYER, BY AVOIDING BUREAUCRATIC OVERSIGHT AND DELAYS. THERE ALSO HAVE BEEN CLAIMS THAT SUPERVISING WAIVERS WOULD BE TOO BURDENSOME AND TOO COSTLY FOR THE EEOC.

I HAVE SEEN NO CONVINCING DATA TO SUPPORT THESE CONTENTIONS. THIS ISN'T SURPRISING GIVEN THAT THERE'S VERY LITTLE UPON WHICH THE EEOC CAN MAKE THIS CLAIM. FROM WHAT I UNDERSTAND, THE EEOC HAS SUPERVISED RELATIVELY FEW WAIVERS IN ITS HISTORY -- BECAUSE IT IS REQUESTED TO DO SO ONLY INFREQUENTLY. IT SEEMS TO ME THAT A CASE CAN BE MADE THAT EVEN MINIMAL SUPERVISION BY THE EEOC -- ENSURING THAT THE OLDER WORKER IS FULLY INFORMED OF WHAT HE OR SHE IS SIGNING AWAY, FOR EXAMPLE -- WOULD HELP REDUCE THE NUMBER OF OLDER WORKERS WHO LATER CRY FOWL ON THE PART OF THEIR EMPLOYER. I'M NOT SAYING

THIS ACTION BY THE EEOC WOULD BE SUFFICIENT, BUT IT DOES ILLUSTRATE THAT THIS ISSUE IS FAR FROM SETTLED.

WHAT IS ABUNDANTLY CLEAR, HOWEVER, IS THAT UNDER THIS RULE UNSUPERVISED WAIVERS WOULD BE VALID UNLESS AND UNTIL AN OLDER WORKER WAS ABLE TO SHOW THAT IT WAS NOT SIGNED KNOWINGLY AND VOLUNTARILY. IN OTHER WORDS, THE BURDEN OF PROOF WOULD BE ON THE BACKS OF OLDER WORKERS. IT ALSO IS OBVIOUS THAT UNDER THIS RULE EMPLOYERS WOULD NEED NO LONGER TO WORRY THAT A WAIVER COULD BE CHALLENGED SOLELY ON THE GROUNDS THAT IT WAS NOT SUPERVISED BY THE EEOC.

WHY IS THE EEOC -- THE FEDERAL AGENCY CHARGED WITH ENFORCING THE A.D.E.A. -- ISSUING RULES WHICH WOULD PLACE OBSTACLES IN THE PATHS OF OLDER WORKERS TO EXERCISING THEIR RIGHTS UNDER THE A.D.E.A.? AND WHY IS THE EEOC MAKING IT EASIER FOR EMPLOYERS TO ELIMINATE THOSE RIGHTS?

THE EEOC RULE WOULD STILL ALLOW AN OLDER WORKER TO FILE A CLAIM, DESPITE THE SIGNING AWAY OF THEIR RIGHTS TO FILE SUIT. UNFORTUNATELY, HAVING LOOKED CLOSELY FOR MANY MONTHS NOW AT THE EEOC'S TRACK RECORD IN HANDLING AGE CLAIMS, I DO NOT THINK OLDER WORKERS WOULD BE WISE TO TAKE MUCH COMFORT IN THIS. AFTER ALL, THIS IS AN AGENCY WHICH, BY MY OWN COUNT, HAS ALLOWED

NEARLY 2,000 -- AND POSSIBLY MANY MORE -- AGE CLAIMS TO RUN THE 2-YEAR STATUTE OF LIMITATIONS.

MR. CHAIRMAN, I BELIEVE A NUMBER OF ISSUES MUST BE RESOLVED BEFORE A POLICY CAN BE FORMULATED WHICH PROTECTS THE RIGHTS OF OLDER WORKERS UNDER THE A.D.E.A. WITHOUT IMPOSING UNDUE REQUIREMENTS UPON EMPLOYERS. IT IS CLEAR TO ME THAT THE RULE, AS CURRENTLY DESIGNED, IS DEEPLY FLAWED, RUNS COUNTER TO CONGRESSIONAL INTENT, AND WOULD JEOPARDIZE THE VERY RIGHTS THE EEOC IS CHARGED WITH PROTECTING.

MR. CHAIRMAN, THIS IS AN ISSUE OF GREAT IMPORTANCE TO A GROWING NUMBER OF AMERICANS, AND I LOOK FORWARD TO WORKING WITH YOU AND THE EEOC TO DEVELOP A SOUND AND WORKABLE POLICY IN THIS AREA. HOWEVER, UNTIL THAT OBJECTIVE IS REACHED, I BELEIVE THAT THE STATUS QUO IS VASTLY PREFERABLE TO LETTING THE FLAWED EEOC RULE GO INTO EFFECT. IF IT'S NOT BROKEN, DON'T FIX IT -- UNLESS YOU MAKE IT BETTER THAN BEFORE.

Senator **Metzenbaum**. I want to thank you, Senator Melcher, both as the chairman of the Special Committee on Aging and as a member of this body. As usual, you are right on target, your testimony is particularly helpful. You and I have worked together on many matters in the past, and I am sure we will continue to do so, particularly in this area. And having you as a leadoff witness is very significant, I believe, to indicate the will and the intent of Congress not to permit this practice to be continued.

I thank you for being with us this morning.

Senator **Melcher**. Thank you very much, Mr. Chairman.

Senator **Metzenbaum**. Our first panel includes Nelson Marans, of Silver Spring, MD; Donald Graham, of Chesterfield, MO, and William Terrell, of Rochester, NY.

The committee has a rule, and I would guess the witnesses have already been apprised, that we ask the witnesses to confine their remarks to 5 minutes, with the understanding that the entirety of their statement will be included in the record.

Mr. Marans, we are happy to hear from you first, sir. Bring the microphone close to you, please.

STATEMENTS OF NELSON MARANS, SILVER SPRING, MD; DONALD GRAHAM, CHESTERFIELD, MO, AND WILLIAM TERRELL, ROCHESTER, NY

Mr. **Marans**. Mr. Chairman, as background, I was 63 years old when I was fired from my position as a research associate at W.R. Grace & Co., after 29 years and 11 months with the Corporate Research Division.

The position of research associate is two levels above that of an entering Ph.D. chemist. I was promoted to that position on the basis of several important accomplishments during my employment. I was inventor or coinventor of 54 U.S. patents, wrote about 15 technical papers as well as chapters in books, and gave a number of talks at technical meetings including tutorial lectures. In addition, I was a recipient of the IR-100 award given for the outstanding 100 inventions during a year. My patent production comprised 4 percent of the total Grace patents during the period from 1977 to 1986.

I am or have been listed in "American Men and Women of Science," "Who's Who in Technology Today," "Who's Who in Commerce and Industry," and "Chemical Who's Who" besides the regional "Who's Who."

At work, I had a continuous record of merit increases, including raises in 1984 and 1985. While the quality and quantity of work had not changed——

Senator **Metzenbaum**. Mr. Marans, you are running so fast, and you have some very important testimony, but you are so anxious to get it all in that we are not hearing much of it. Could you just slow it down a little bit?

Mr. **Marans**. All right. I didn't want to take too much of your time.

While the quality and quantity of work had not changed, I was given an unsatisfactory performance appraisal by my new manager in April 1986. On Thursday, July 16, 1987, I was called into my manager's office for a performance appraisal.

Senator **Metzenbaum**. What was the time span?

Mr. **Marans**. Fifteen months between the two appraisals.

Senator **Metzenbaum**. OK.

Mr. **Marans**. He stated that he considered that my work was unsatisfactory, and I was told to see the vice president of the Research Division the next day. The manager informed me that at the meeting the next day, I would be presented with two options—one of early retirement with the details unknown to him; the other a position as an information specialist which would involve a demotion.

The next day, Friday, July 17, 1987, the vice president reiterated these options. He stated that he would give me a copy of the proposed early retirement agreement later, but that I should interview immediately for the information specialist position. I did this that Friday afternoon with the departmental manager and the next Monday with the supervisor. I had no indication that I would not get the position, and in fact was asked to train on Friday, July 24, a week later, for the job. This, I did for 3 hours in the morning.

However, on that same Friday at 4:30 p.m., I was called again into the vice president's office and told that although no decision had been made as to whether I would get the information specialist position, here was a copy of the retirement agreement.

The agreement offered 1 year's pay at a salary of $55,000, and in return I would have to release W.R. Grace & Co. from all claims forever. I scanned it rapidly and was repelled by its impossible terms.

I informed the vice president that I did not think I could sign such a repugnant agreement. He said that I would have the weekend to consider signing it and would get back to me on Monday. He stated that I could see a lawyer about it. My wife took it to her father, who stated that it was the most repulsive agreement that he had seen in his 60 years of law practice.

A copy of the agreement should be available to you—is it?

Senator **Metzenbaum**. Yes. The entire agreement will be included in the record.

Mr. **Marans**. All right, fine.

The sections that are particularly offensive are 2, 7, and 8. Paragraph 2 states that the company reserves the right to stop payment immediately if the company deems that my conduct or actions are detrimental to the company—whatever that means for an international company such as W.R. Grace.

Paragraph 8 invokes the threat of damages in the event that I file charges against the company with any Federal, State, or local administrative agency or judicial body. The meaning is quite clear. The agreement states that Grace can sue me for all payments that the company has made to me, even for the vacation pay that I had already earned in 1987 and for any additional amounts that Grace desires. The same penalty is invoked for disclosing the terms of the agreement.

It is understandable why no one who has signed the agreement has disclosed its contents.

Finally, in paragraph 7, I am forced to give a general release for everything, including physical damage, that I may have suffered from chemicals during my 29 years and 11 months employment period.

At 3:30 p.m. on Monday, July 27, the vice president again called me into his office and told me that the information specialist opening was not available to me. He demanded that I sign the agreement immediately. When I refused, I was fired at once, and all benefits stopped as of my final working day of July 31.

I was told that I was expected to finish, in the next 4 days all of my laboratory work, complete my notebooks, discard my files, turn over the radiation monitoring records in good order to the new radiation safety officer, and go through a lengthy checkout procedure.

When I complied conscientiously over the next 4 days to these impossible demands, I injured my legs and back. I then wound up flat on my back for the better part of the next 6 weeks from injuries incurred during these last 4 days of work. The company's insurers both for medical and for workers' compensation refused to pay my medical bills despite my COBRA continuation.

I was not the only older employee to receive the agreement. During the same brief period in July 1987, three other individuals over the age of 40 were given the same agreement, and they signed.

I filed an age discrimination charge with the Washington EEOC office on August 12, 1987. The charge was transferred to Baltimore in September 1987 and an agent assigned in October.

Since that time, I have been in frequent contact with the Baltimore EEOC office and have supplied a large amount of additional information on my charge. While the individual agents assigned to the case have been cooperative, apparently the decision has been made at some higher level not to press the case.

Senator **Metzenbaum**. What makes you think that?

Mr. **Marans**. One of the agents informed me of that.

Senator **Metzenbaum**. One of the agents informed you of it?

Mr. **Marans**. Yes, but that obviously was unofficial. He said that originally EEOC had said, "We are anxious to force the case," and then suddenly the atmosphere changed in February and they said, "Well, you know, we only force a certain number of the cases to trial." They said, "You will probably have to go out on your own and sue on your own."

Senator **Metzenbaum**. Did he indicate that the fact that the Grace Co. has been so close to the administration had had any political impact upon the decision?

Mr. **Marans**. That's a very touchy question. He didn't say it, but I thought it. But of course that's a personal opinion and obviously, I had no basis for that.

However, Grace has been formally charged with a violation for asking employees to waive their rights to sue.

It is impossible to convey to the members of the Subcommittee my feelings about my summary dismissal, the demeaning contract, the treatment both on the job after refusing to sign the agreement, and the practices that the company has resorted to since my firing.

I felt that I had wasted nearly 30 years of my life working for a company that has no conscience.

The loss of my position has been devastating not only to me, but to my entire family. However, I do feel that I at least remained principled and ethical during this trying period—attributes that the management at Grace cannot possibly share.

Senator **Metzenbaum**. Thank you very much. We will hear from the entire panel before we get into the questions.

[The prepared statement of Mr. Marans with attachments follow:]

Nelson Marans

As background I was 63 years old when I was fired from my position as a research associate at W. R. Grace & Co. after twenty-nine years and eleven months with the corporate research division. The position of research associate is two levels above that of an entering Ph.D. chemist. I was promoted to that position on the basis of several important accomplishments during my employment. I was inventor or coinventor of fifty-four U.S. patents, wrote about fifteen technical papers as well as chapters in books and gave a number of talks at technical meetings including tutorial lectures. In addition I was a recipient of the IR-100 award given for the outstanding 100 inventions during a year. My patent production comprised 4% of the total Grace patents during the period from 1977-1936. I am or have been listed in American Men and Women of Science, Who's Who in Technology Today, Who's Who in Commerce and Industry and Chemical Who' Who besides the regional Who's Who.

At work I had a continuous record of merit increases including raises in 1984 and 1985. While the quality and quantity of work had not changed, I was given an unsatisfactory performance appraisal by my new manager in April 1986. On Thursday, July 16, 1987 I was called into my manager's office for a performance appraisal. He stated that he considered that my work was unsatisfactory and I was told to see the Vice-President of the Research Division the next day. The manager informed me that at the meeting the next day I would be presented with two options, one of early retirement with the details unknown to him, the other a position as an information specialist which would involve a demotion. The next day, Friday, July 17, 1987 the Vice-President reiterated these options. He stated that he would give me a copy of the proposed early retirement agreement later but that I should interview immediately for the information specialist position. I did this that Friday afternoon with the departmental manager and the next Monday with the supervisor. I had no indication that I would not get the position and in fact was asked to train on Friday, July 24 for the job. This I did for three hours in the morning.

However the same day at 4:30 PM I was called again into the Vice-President's office and told that although no decision had been made as to whether I would get the information specialist position, here was a copy of the retirement agreement. The agreement offered one year's pay at a salary of $55,000 and in return I would have to release W. R. Grace & Co. from all claims forever. I scanned it rapidly and was repelled by its impossible terms. I informed the Vice-President that I did not think that I could sign such a repugnant agreement. He said that I would have the weekend to consider signing and would get back to me on Monday. He stated that I could see a lawyer about it. My wife took it to her father who stated that it was the most repulsive agreement that he had seen in his sixty years of law practice. A copy of the agreement should be available to you. The sections that are particularly offensive are 2, 7 and 8. Paragraph 2 states that the company reserves the right to stop payment immediately if the company deems that my conduct or actions are detrimental to the company-whatever that means for an international company. Paragraph 8 invokes the threat of damages in the event that I file charges against the company with any federal, state or local administrative agency or judicial body. The meaning is quite clear. The agreement states that Grace can sue me for all payments that the company has made to me even for the vacation pay that I had already earned in 1987 and for any additional amounts that Grace desires. The same penalty is invoked for disclosing the terms of the agreement. It is understandable why no one who has signed the agreement has disclosed its contents. Finally in paragraph 7,I am forced to give a general release for everything including physical damage that I may have suffered from chemicals during my twenty-nine years and eleven months employment period.

At 3:30 PM on Monday,July 27, the Vice-President again called me into his office and told me that the information specialist opening was not available to me. He demanded that I sign the agreement immediately. When I refused, I was fired at once and all benefits stopped as of my final working day of July 31. I was told that I was expected to finish in the next four days all of my laboratory work, complete my notebooks, discard my files, turn over the radiation monitoring records in good order to the new radiation safety officer and go through a lengthy check-out procedure. When I complied conscientiously over the next four days to these impossible demands, I injured my legs and back. I then wound up flat on my back for the better part of the next six weeks from injuries incurred during these last four days of work. The company's insurers both for medical and for workers' compensatiom refused to pay my medical bills despite my COBRA continuation.

I was not the only older employee to receive the agreement. During the same brief period in July 1987, three other individuals over the age of 40 were given the same agreement and they signed.

I filed an age discrimination charge with the Washington EEOC office on August 12. The charge was transferred to Baltimore in September 1987 and an agent assigned in October. Since that time I have been im frequent contact with the Baltimore EEOC office and have supplied a large amount of additional information on my charge. While the individual agents assigned to the case have been cooperative, apparently the decision has been made at some higher level not to press the case. However Grace has

has been formally charged with a violation for asking employees to waive their right to sue.

It is impossible to convey to the members of the subcommittee my feelings about my summary dismissal, the demeaning contract, the treatment both on the job after refusing to sign the agreement and the practices that the company has resorted to since my firing. I felt that I had wasted nearly thirty years of my life working for a company that has no conscience. The loss of my position has been devastating not only to me but to my entire family. However I do feel that I, at least, remained principled and ethical during this trying period, attributes that the management at Grace can not possibly share.

CONFIDENTIAL

AGREEMENT

This AGREEMENT, made this 24th day of July, 1987, is between the Research Division of W. R. Grace & Co. (herein called COMPANY) and Nelson S. Marans, residing at
12120 Kerwood Road, Silver Spring, Maryland 20904.

IT IS HEREBY AGREED as follows:

1. Dr. Nelson S. Marans will voluntarily accept a leave of absence from his active employment with the COMPANY from Wednesday, July 29, 1987, to Thursday, July 28, 1988, inclusive. During such period, Dr. Marans will remain an employee of the COMPANY and may, from time to time, be asked to consult with respect to his prior work on behalf of the COMPANY.

2. Dr. Marans' employment with the COMPANY will terminate effective as of July 28, 1988. The COMPANY reserves the right to terminate Dr. Marans' employment earlier should it determine Dr. Marans' conduct or actions are detrimental to COMPANY interest.

3. The COMPANY will pay Dr. Marans compensation at an annualized rate of $55,000 during the period from July 29, 1987, to July 28, 1988, inclusive. This will be paid semimonthly unless Dr. Marans elects a lump-sum payment as provided in (5) below.

4. Dr. Marans shall continue to be treated as an active participant under the Grace benefit plans (except Long Term Disability insurance) in which he actively participated on July 24, 1987, during the period from July 29, 1987, to July 28, 1988, inclusive, subject to the terms of each such plan as amended from time to time. In the event that Dr. Marans shall become employed by an employer after July 29, 1987, and before July 28, 1988, and become covered under such employer's medical plan, dental plan, life insurance plan, accidental death and dismemberment plan, voluntary group accident plan, or business travel accident insurance plan, his coverage under, and his entitlement to benefits under, the corresponding W. R. Grace & Co. plans shall thereupon cease.

5. Dr. Marans may elect to receive his leave of absence payments, or any balance thereof due at any time, as a lump-sum payment. Such an election will result in termination of employment and of all benefit coverages, except for medical and dental coverage which Dr. Marans may extend for up to 18 months by paying the appropriate premiums.

6. Upon termination of employment, the COMPANY will pay to Dr. Marans any unused 1987 and 1988 vacation.

7. Dr. Marans agrees and covenants that he will, and hereby does, forever and irrevocably release and discharge W. R. Grace & Co. and its subsidiaries, their officers,

directors, employees, successors, assigns, and representatives, from any and all claims, demands, charges, debts, defenses, actions or causes of action, obligations, damages and liabilities whatsoever which he now has, has had, or may have, whether the same be at law, in equity, or mixed, in any way arising from his termination from employment with the COMPANY, and any other claims, demands, charges, debts, defenses, actions or causes of action, obligations, damages and liabilities which arose at any time prior to the date of the Agreement. It is expressly agreed and understood that paragraph 7 of this Agreement is a General Release.

8. Dr. Marans further agrees and covenants not to file any charges or complaints against the COMPANY with any federal, state or local administrative agency or judicial body. Dr. Marans further agrees that the terms of this Agreement are strictly confidential and expressly covenants not to display, publish, disseminate or disclose any terms of this Agreement to any person or business entity. It is expressly agreed that any violation of the terms of this paragraph 8 shall be deemed a material breach of this Agreement entitling the COMPANY to immediately cease making all payments hereunder and to recover the entire amount paid to Dr. Marans under paragraphs 3 and 6 of this Agreement. This remedy shall be in addition to and not in lieu of any other remedy to which the COMPANY may be entitled.

9. This Agreement shall be binding upon the assigns, heirs, executors, and administrators of Dr. Marans.

10. Dr. Marans affirms that the terms stated herein are the only consideration for signing this Agreement, and no other promise or agreement of any kind has been made to or with him by any person or entity whatsoever that caused him to sign this Agreement.

11. Dr. Marans has fully reviewed the terms of this Agreement and acknowledges that he has had an opportunity to review it with counsel if desired. Based upon that review, Dr. Marans hereby acknowledges that he fully and completely understands and accepts the terms, conditions, nature, and effect of this Agreement, which he voluntarily executed.

12. This Agreement may not be changed orally.

13. Dr. Marans hereby represents and warrants to the Company that he is not in possession of any materials in written or other tangible form which embody in whole or in part any information which is proprietary to the Company; and that all such materials previously possessed by him have been returned to the Company.

14. All the provisions of this Agreement except for paragraphs 1, 3, 4, 5, and 6 shall survive the termination of Dr. Marans' employment with the Company on July 28, 1988.

____
Nelson S. Marans

STATE OF__________________)
) SS;
COUNTY OF_________________)

On this ________day of ______________, 1987, before me, personally came Nelson S. Marans, to me known, and known to me to be the individual described in, and who executed, the foregoing Agreement, and he duly acknowledged to me that he executed the same.

____
Notary Public

WITNESS;

____

a:0003wgr
WGR/bgm

12120 Kerwood Road
Silver Spring, Maryland, 20904
August 3, 1987

Mr. Peter Grace
Chairman and Chief Executive Officer
W. R. Grace & Co.
Grace Plaza, 1114 Avenue of the Americas
New York, New York, 10036-7794

Dear Mr. Grace:

I was shocked by my recent firing without any termination pay from the W. R. Grace Research Division after twenty-nine years and eleven months of loyal service to the company. In addition all benefits were stripped immediately. The reason for the discharge was two successive poor performance reviews; the reason for firing without termination pay or benefits was my refusal to sign the enclosed contract.

My record with the company has included over fifty patents; my age at discharge was 63 years and two months. I had intended to work at Grace only until 65 years and would have left the company at that time. More to the point, I was willing to leave at 63 with the usual one year termination pay spread over the slightly less than two years remaining to my sixty-fifth birthday.

I did not sign the enclosed contract because the terms were demeaning and denigrating. I sympathize with the other professionals who have been forced to sign this agreement because of financial necessity, but by the letter of the contract have not been able to speak about this disgrace. As far as I know I have been the only individual who has refused to sign.

The sequence of events was not much better. I was presented with the agreement by Dr. Joseph Raksis at 4:30 PM Friday afternoon July 24th at which time I indicated that I would refuse to sign the contract. The termination date on signing would have been July 29th. I was given until Monday, July 27th to decide, was called in again by Dr. Joseph Raksis at 3:30 PM and again asked to sign When I explained that the document was dehumanizing, I was fired and ordered to leave by July 31st with salary and benefits terminating at that time(a full four days during which I completed my laboratory work, transferred the radiation protection office program to another professional and cleaned out 30 years of files).

I informed Dr. Raksis that the American Chemical Society guidelines for discharge requires four weeks notice and two weeks for every year of employment or a total of 64 weeks. I was told that Grace had no intention of following ACS guidelines.

I protest as a former loyal employee and a Grace stockholder the abruptness of the firing, the absence of any semblance of termination pay and the subhuman treatment. I assure you that my firing has not inspired loyalty among the professionals at the W. R. Grace Research Division. I feel that the responsibility for the discharge flows from the top of the Corporate Research Group, namely Dr. Peter Boer, and through the chain of command to the Personnel Department.

To retain creative people at the W. R. Grace Research Division, you must see that they are treated as professionals. A drastic change in the attitude of top management is required. Thank you for considering my comments.

Sincerely yours,

Nelson Marans

Nelson Marans

J.P. Bolduc, Vice Chairman

GRACE

W. R. Grace & Co.
Grace Plaza
1114 Avenue of the Americas
New York, NY 10036-7794

August 12, 1987

Mr. Nelson Marans
12120 Kerwood Road
Silver Spring, MD 20904

Dear Mr. Marans:

Thank you for your letter of August 5, 1987 and the accompanying copy of the letter you sent to Mr. J. Peter Grace on August 3, 1987.

The purpose of this letter is threefold. First, it is to advise you that we have received your letters. Second, it is to tell you that we are currently reviewing and assessing the matters you described in your letter to Mr. Grace of August 3rd. And third, it is to advise you that you will shortly be receiving from W. R. Grace & Co. a more detailed response to the questions you raised.

Sincerely,

JPB

GRACE

F. Peter Boer, Senior Vice President

W. R. Grace & Co.
Grace Plaza
1114 Avenue of the Americas
New York, NY 10036-7794
(212) 819-6882

August 12, 1987

Dr. Nelson S. Marans
12120 Kerwood Road
Silver Spring, MD 20904

Dear Dr. Marans:

Mr. J. Peter Grace has referred your letter of August 3, 1987 to my office for response.

As you know, the Company expects all employees to maintain a level of performance which continues to contribute to the goals and objectives of the organization. As your memo indicates, you were discharged due to continued poor work performance. During the past several years, you have been encouraged to take steps, with the assistance of management, to improve your performance. When your performance did not improve, you were offered the opportunity to interview for an alternative position within the Information Services Department. When you did not indicate that you would make a serious commitment to this position, and resisted opportunities to become familiar with the position's responsibilities and equipment, this option could no longer be pursued.

Alternatively, you were extended an offer which would have provided you with one year's full pay and full benefits. The benefits provided to you in this agreement far exceeded what would normally be provided, by WRC policy, to a terminated employee and, in return, we would expect such an agreement to be executed. Management did take ACS guidelines into consideration when assembling the agreement. The offer was presented to you, in writing, on Friday, July 24, 1987 by Dr. Joseph Raksis who informed you that a decision was not required until the following Wednesday, July 29, 1987. When Dr. Raksis discussed the details of this offer with you one week earlier, you requested a written proposal. By your refusing to sign the agreement, and with no other appropriate positions available, the Company elected to terminate your employment effective July 31, 1987. You received one month's extra pay (plus pay for unused vacation), as provided by WRC policy. This termination does not affect your eligibility for all retirement benefits.

As an additional point of clarification, all performance appraisals, and the subsequent recommendation for termination, were initiated by your department management, Drs. Jachimowicz and Raksis. The request to pursue termination did not originate from my office, nor from the President of the Research Division, nor from the Personnel Department.

Nelson, we realize each employee has his or her own personal issues, responsibilities and emotions which must be considered. In response, the Company extends every effort to employees in such a situation to make the transition as smooth as possible. Our intent was to allow you to leave with dignity and self-respect. The agreement presented to you was not intended to be demeaning. The agreement purposely does not include any statements regarding past performance and only addresses the terms and conditions therein. I believe the Company has made every effort to provide you with the opportunity to improve your work performance, including the possibility of an alternative position in the Information Center. When this did not work out you were offered substantial help to assist in your transition, which you have elected to decline.

Very truly yours,

cc: Mr. J. Peter Grace, Jr.

Eileen M. Stein
Attorney at Law
7504 Bybrook Lane
Chevy Chase, Maryland 20815

(301) 657-9220

October 1, 1987

Mr. J. Peter Grace, Jr.
Chairman and Chief Executive Officer
W. R. Grace & Company
Grace Plaza
1114 Avenue of the Americas
New York, New York 10036-7794

Re: Nelson S. Marans, Ph.D.

Dear Mr. Grace:

I have been retained by Dr. Nelson S. Marans, who was recently fired from the W. R. Grace Research Division at the age of 63 after nearly 30 years of employment.

Information provided to me by Dr. Marans indicates that his discharge was part of a calculated effort to get rid of older employees, which began with an attempt to pressure Dr. Marans and others to take early retirement in 1983. When Dr. Marans declined the early retirement package, he was given poor performance evaluations in 1986 and 1987, which were totally unjustified and at variance with his undisputed fine record up to 1985 and his continued performance at the same level. He was then offered the choice of early retirement or a transfer to a position in another department; when he pursued the alternative position to the point of interviewing for it with two supervisors and participating for several hours in a taped instructional orientation program, that offer was withdrawn. Finally, he was told that he would be given a one-year paid leave of absence provided he signed an agreement stating, *inter alia*, that he would never file any complaints against the company with any judicial or administrative body, that he would never disclose the terms of the agreement, and that the company could fire him any time it chose and he waived any rights or claims he might have against it for doing so or for any other reason. When Dr. Marans refused to sign this unconscionable agreement, a copy of which I enclose herewith, he was summarily fired.

The inference is inescapable that this course of conduct constitutes a violation of the Age Discrimination in Employment Act and of Dr. Marans's rights under other statutory and common law. The fact that other employees in the protected age group have been subjected to similar treatment only serves to reinforce this conclusion.

Dr. Marans has filed a charge of discrimination with the Equal Employment Opportunity Commission, which is a necessary prerequisite to suit under the ADEA. I have made a quick calculation of the monetary damages my client has suffered from loss of salary and benefits. Assuming that he were to retire at age 65, his direct financial loss for these items alone during his expected lifetime exceeds $700,000. If he were to continue working beyond age 65 -- as he is of course legally entitled to do -- his loss would be far greater. These calculations do not include compensation for physical injuries he sustained when forced to clear out 30 years of files in four days without assistance, nor do they include his less easily quantifiable actual damages, punitive damages, or attorneys fees.

As you doubtless know, Dr. Marans is entitled to recover twice his actual damages under the ADEA if the company's violation was willful. There is ample evidence here from which a jury could find willfulness, even aside from the prolonged duration of the campaign to get rid of Dr. Marans, which began well before there was any suggestion of weaknesses in his performance.

Dr. Marans was repeatedly pressured by company officials to sign a waiver of his right to file an age discrimination complaint. Numerous federal courts, including at least one circuit court of appeals, have held such a waiver to be an unlawful attempt to deny to the EEOC the information it needs to advance the public interest in preventing employment discrimination, and therefore contrary to public policy. Moreover, the combined effect of paragraphs 2 and 7 of the enclosed agreement is that the company could have unlawfully terminated my client's employment a week after he signed the agreement, and he would have waived his right to any remedy. Such prospective waiver of rights under federal employment discrimination laws has been specifically disapproved as contrary to public policy by the Supreme Court of the United States as well as numerous lower courts.

Willfulness is also indicated by the retaliation in which the company is presently engaged against my client. He has submitted legitimate claims for medical expenses since the filing of his EEOC charge. Despite the fact that he elected to continue his coverage under the Grace medical plan, and his payment of the full premium has been acknowledged by the company, his claims have been rejected on the basis that the medical expenses were incurred "after coverage terminated." At the same time, the company's workers' compensation administrator, to which he was initially referred when he tried to claim under the medical plan, has rejected his claim under workers' compensation, directing him to submit his bills instead to his "group health carrier." As a result of this classic run-around, his claims have still not been paid. There is no possible justification for this shabby treatment.

I have advised Dr. Marans of the various legal remedies available to him. I have also advised him that every court which has considered the issue has enjoined employers from enforcing the provisions of agreements such as the enclosed to withdraw benefits from former employees who cooperate in an EEOC investigation or employment discrimination suit. Thus, I do not think he will encounter much difficulty in obtaining evidence in support of his case from other former Grace employees who have been treated as he was.

Before pursuing the avenues open to him, however, Dr. Marans wishes to make one final attempt to resolve this matter without litigation. Accordingly, he has authorized me to propose the following as a basis on which this dispute could be settled: The company will make an immediate lump sum payment to Dr. Marans equivalent to his salary for the period July 31, 1987 through June 30, 1989, and place him on retirement status effective August 1, 1987 with all benefits to which an individual retiring after age 65 with his length of service would be entitled, including uninterrupted medical and dental coverage. In addition, the company will of course reimburse all his medical and pharmaceutical bills for his work-related injury, and will compensate him for his legal fees (which to date are minimal). In return, Dr. Marans will accept this arrangement in full settlement of his employment discrimination claims, and will withdraw his pending EEOC charge.

You will note the similarity between this proposal and the "early retirement" arrangement the company offered to Dr. Marans in 1983. This offer is made solely in a spirit of compromise to attempt settlement of my client's claims, and is without prejudice to his right to pursue those claims in full if the offer is rejected.

If you are interested in a resolution of Dr. Marans's claims along these lines, thereby avoiding the costs and risks of litigation, please have your counsel contact me by October 30, 1987.

Very truly yours,

(signed) EILEEN M. STEIN

Eileen M. Stein

Enclosure

cc: Francois P. van Remoortere
President, W. R. Grace Research Division

VENABLE, BAETJER AND HOWARD
ATTORNEYS AT LAW
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
1800 MERCANTILE BANK & TRUST BUILDING
2 HOPKINS PLAZA
BALTIMORE, MARYLAND 21201
(301) 244-7400

WRITER'S DIRECT NUMBER IS
244-7442

WASHINGTON, D.C. OFFICE
SUITE 1200
1301 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004
(202) 662-4300

RICHARD M. VENABLE (1839-1910)
EDWIN G. BAETJER (1868-1945)
CHARLES MCH. HOWARD (1870-1942)

JEFFREY P. AYRES, P.C.

VIRGINIA OFFICES
PLAZA SUITE THREE
4141 NORTH HENDERSON ROAD
ARLINGTON, VIRGINIA 22203
(703) 243-5000

SUITE 500
2000 CORPORATE RIDGE
McLEAN, VIRGINIA 22102
(703) 749-3500

October 30, 1987

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Eileen M. Stein
Attorney at Law
7504 Bybrook Lane
Chevy Chase, Maryland 20815

Re: Nelson S. Marans, Ph.D.

Dear Ms. Stein:

W. R. Grace & Company is now in a position to respond to your letter of October 1, 1987, to Mr. Grace. For the reasons that I will explain in this letter, the Company disputes your factual interpretation of the termination of Doctor Marans. Moreover, we are not interested in your settlement offer.

Doctor Marans was terminated for continued poor work performance. He repeatedly was counseled by the Company over the years, yet did not improve. Moreover, Doctor Marans declined to make a serious commitment to a transfer opportunity, as an alternative to discharge, to a position within the Company's Information Services Department. Doctor Marans also rejected a generous severance pay offer that would have provided him with one year's full pay and full benefits.

These circumstances are fully described in Mr. Boer's letter to Doctor Marans dated August 12, 1987. I assume that you have a copy of this letter or can obtain one readily from your client.

As for the settlement offer in your letter of October 1st, the Company rejects it. Nevertheless, in the spirit of compromise and to avoid further legal expense in this matter, we propose a counter-offer.

We propose to pay Doctor Marans the equivalent of one year's salary minus the one month's severance pay which the Company already paid your client. This amounts to $50,417. We further propose to pay Doctor Marans his legal expenses to date (assuming, as you claim in your October 1st letter, that these expenditures are minimal). Finally, the Company proposes to pay your client his medical expenses through September 1987.

In exchange for these payments, of course, we would expect Doctor Marans to execute a full general release of (and covenant not to sue concerning) any and all claims arising out of your client's employment with or termination by the Company -- including his outstanding workers' compensation claim. This release and covenant not to sue also would include, among other things, a non-admission of liability clause. It would also include, for example, a provision under which Doctor Marans would agree to keep the terms of the settlement (including the amount of the settlement) confidential. As a final example, Doctor Marans would agree to withdraw his outstanding workers' compensation claim and appeal.

The Company's counter-offer will remain open for a period of two weeks from your receipt of this letter. This counter-offer is made in the spirit of compromise and should in no way be interpreted as an admission of liability on the part of the Company. Please contact me if Doctor Marans decides to accept this counter-offer.

Sincerely,

Jeffrey P. Ayres

JPA:lac
5816Y-22

DRAFT

Eileen M. Stein
Attorney at Law
7504 Bybrook Lane
Chevy Chase, Maryland 20815

(301) 657-9220

November 9, 1987

Jeffrey P. Ayres, Esquire
Venable, Baetjer & Howard
1800 Mercantile Bank & Trust Building
2 Hopkins Plaza
Baltimore, Maryland 21201

Re: Nelson S. Marans, Ph.D.

Dear Mr. Ayres:

I have received your letter of October 30 and had an opportunity to review it with my client. The counteroffer it contains is totally inadequate. Rather than an attempt at compromise, it appears virtually the same as the unacceptable proposal made to Dr. Marans before his termination, with the added feature that it would deprive him of the workers' compensation benefits to which he is entitled. Consequently, my client has instructed me to reject it.

If you would like to propose another basis for settlement better calculated to compromise the differences between your client and mine, we will be happy to consider it. Otherwise Dr. Marans will have no alternative but to pursue the legal remedies available to him.

Very truly yours,

Eileen M. Stein

W.R. Grace Admits It Told Falsehoods To U.S. Authorities

By Gary Putka
Staff Reporter of The Wall Street Journal

BOSTON—W.R. Grace & Co. pleaded guilty to a charge of lying to federal authorities investigating the contamination of drinking wells in Woburn, Mass., where families have alleged that polluted water caused six leukemia deaths, illness and birth defects.

Grace changed its plea from innocent on the day before the case was scheduled for trial, ending six years of civil and criminal litigation that has been closely followed by environmental activists. Grace was fined $10,000, the maximum penalty for making misleading statements when they were made, in a 1982 letter.

Michael DeLand, regional administrator of the U.S. Environmental Protection Agency, claimed victory in the case. But Grace continued to assert its lack of culpability, saying rules of federal procedure allowed it to maintain innocence despite the guilty plea.

In the count covered by the guilty plea, Grace was accused of knowingly understating the amount of acetone it used at its Woburn plant over the years covered by the EPA inquiry. A second count against the company, alleging unlawful concealment of dumping chemicals near the food-package machine plant, was dropped.

In a 1986 settlement of a separate civil suit, Grace agreed to pay $9 million to plaintiffs who claimed that chemical pollutants from Grace's Woburn plant caused death and illness in their families. A federal jury had previously found that Grace "substantially contributed" to the pollution of the wells. The civil case represented a rare claim for damages from a corporation for personal injury from polluted ground water.

Mr. DeLand acknowledged that the penalty is "a small amount in dollar terms," but said Grace had been found guilty of "a seriously unethical corporate practice." He said Grace would have faced a fine of as much as $500,000 if it committed the same acts today.

Hugh Carey, the former New York governor and now a W.R. Grace environmental official, said Grace's plea bargaining "amounts to a painful exercise," but added, "we did a reasonable and responsible thing" to spare the company further court proceedings.

The contaminated wells, which the EPA found to contain high levels of dangerous solvents, were capped in 1979. The Grace Woburn plant has been converted to another use.

Wall St. Jnl.
p. 30
6/1/88

Wall Street Journal
June 1, 1988

CONFIDENTIAL

AGREEMENT

This AGREEMENT, made this 24th day of July, 1987, is between the Research Division of W. R. Grace & Co. (herein called COMPANY) and Nelson S. Marans, residing at 12120 Kerwood Road, Silver Spring, Maryland 20904.

IT IS HEREBY AGREED as follows:

1. Dr. Nelson S. Marans will voluntarily accept a leave of absence from his active employment with the COMPANY from Wednesday, July 29, 1987, to Thursday, July 28, 1988, inclusive. During such period, Dr. Marans will remain an employee of the COMPANY and may, from time to time, be asked to consult with respect to his prior work on behalf of the COMPANY.

2. Dr. Marans' employment with the COMPANY will terminate effective as of July 28, 1988. The COMPANY reserves the right to terminate Dr. Marans' employment earlier should it determine Dr. Marans' conduct or actions are detrimental to COMPANY interest.

3. The COMPANY will pay Dr. Marans compensation at an annualized rate of $55,000 during the period from July 29, 1987, to July 28, 1988, inclusive. This will be paid semimonthly unless Dr. Marans elects a lump-sum payment as provided in (5) below.

4. Dr. Marans shall continue to be treated as an active participant under the Grace benefit plans (except Long Term Disability insurance) in which he actively participated on July 24, 1987, during the period from July 29, 1987, to July 28, 1988, inclusive, subject to the terms of each such plan as amended from time to time. In the event that Dr. Marans shall become employed by an employer after July 29, 1987, and before July 28, 1988, and become covered under such employer's medical plan, dental plan, life insurance plan, accidental death and dismemberment plan, voluntary group accident plan, or business travel accident insurance plan, his coverage under, and his entitlement to benefits under, the corresponding W. R. Grace & Co. plans shall thereupon cease.

5. Dr. Marans may elect to receive his leave of absence payments, or any balance thereof due at any time, as a lump-sum payment. Such an election will result in termination of employment and of all benefit coverages, except for medical and dental coverage which Dr. Marans may extend for up to 18 months by paying the appropriate premiums.

6. Upon termination of employment, the COMPANY will pay to Dr. Marans any unused 1987 and 1988 vacation.

7. Dr. Marans agrees and covenants that he will, and hereby does, forever and irrevocably release and discharge W. R. Grace & Co. and its subsidiaries, their officers,

directors, employees, successors, assigns, and representatives, from any and all claims, demands, charges, debts, defenses, actions or causes of action, obligations, damages and liabilities whatsoever which he now has, has had, or may have, whether the same be at law, in equity, or mixed, in any way arising from his termination from employment with the COMPANY, and any other claims, demands, charges, debts, defenses, actions or causes of action, obligations, damages and liabilities which arose at any time prior to the date of the Agreement. It is expressly agreed and understood that paragraph 7 of this Agreement is a General Release.

8. Dr. Marans further agrees and covenants not to file any charges or complaints against the COMPANY with any federal, state or local administrative agency or judicial body. Dr. Marans further agrees that the terms of this Agreement are strictly confidential and expressly covenants not to display, publish, disseminate or disclose any terms of this Agreement to any person or business entity. It is expressly agreed that any violation of the terms of this paragraph 8 shall be deemed a material breach of this Agreement entitling the COMPANY to immediately cease making all payments hereunder and to recover the entire amount paid to Dr. Marans under paragraphs 3 and 6 of this Agreement. This remedy shall be in addition to and not in lieu of any other remedy to which the COMPANY may be entitled.

9. This Agreement shall be binding upon the assigns, heirs, executors, and administrators of Dr. Marans.

10. Dr. Marans affirms that the terms stated herein are the only consideration for signing this Agreement, and no other promise or agreement of any kind has been made to or with him by any person or entity whatsoever that caused him to sign this Agreement.

11. Dr. Marans has fully reviewed the terms of this Agreement and acknowledges that he has had an opportunity to review it with counsel if desired. Based upon that review, Dr. Marans hereby acknowledges that he fully and completely understands and accepts the terms, conditions, nature, and effect of this Agreement, which he voluntarily executed.

12. This Agreement may not be changed orally.

13. Dr. Marans hereby represents and warrants to the Company that he is not in possession of any materials in written or other tangible form which embody in whole or in part any information which is proprietary to the Company; and that all such materials previously possessed by him have been returned to the Company.

14. All the provisions of this Agreement except for paragraphs 1, 3, 4, 5, and 6 shall survive the termination of Dr. Marans' employment with the Company on July 28, 1988.

____

Nelson S. Marans

STATE OF__________________)
) SS;
COUNTY OF__________________)

On this ________day of ______________, 1987, before me, personally came Nelson S. Marans, to me known, and known to me to be the individual described in, and who executed, the foregoing Agreement, and he duly acknowledged to me that he executed the same.

____

Notary Public

WITNESS;

____

a:0003wgr
WGR/bgm

Senator **Metzenbaum**. Mr. Donald Graham, we are happy to have you with us, sir.

Mr. **Graham**. Thank you. Good morning, Mr. Chairman, ladies and gentlemen.

My name is Donald Graham, and I am a 55-year-old manager caught up in the new business fad of downsizing and restructuring.

I was terminated on December 15, 1987 after having spent 10 years with Pet, Inc., 5 of which were in the St. Louis headquarters office. The previous 5 years had been with a company purchased by Pet in 1982; namely, the William Underwood Co.

At the time of my termination, my position was Director of Product Services for Pet's International Group.

The circumstances surrounding the termination of about 100 of Pet's employees followed the announcement by Karl Bays, the new chairman of I.C. Industries—Pet's parent company—that the operating units were directed to reduce operating costs by $50 million for 1988.

I was informed by my supervisor on November 23, 1987 that my position was eliminated, and I would be terminated effective December 15, 1987—the end of Pet's fiscal year. I was informed at that time that I would receive "enhanced" severance, and that I would qualify for early retirement with "enhanced" benefits.

On December 3, 1987, I attended one of several meetings held by the Human Resources Department for terminated employees to explain the termination procedure for those being terminated and to explain the severance packages.

There were 5 people in my meeting—that is out of the 100 that were being terminated. They held numerous meetings with small numbers of employees. At this meeting, we were given a copy of a "Settlement Agreement and General Release" that we were required to sign if we were to receive "enhanced benefits". I believe you have a copy of that agreement, and please refer to the heavy print paragraph 3, which is to me the offending paragraph.

We were at that time advised to consult our attorney and were not given a definite time limit in which to sign.

I, as did others that I know of, consulted an attorney about the release and discussed filing an age discrimination suit. However, my attorney and I concluded that such a suit would be a long, drawn-out affair, and I required the enhanced package to survive while I looked for a position where I could use my talents and training.

I knew that at age 55, it would take quite a while to land a position, and with one son in college and another in high school, I needed the income it provided.

We also concluded that the benefits, if we won, would probably not be enough to pay the attorney fees that would accrue—a catch-22 situation.

The enhanced severance benefits amounted to about two and one-half times the normal severance. Therefore, I was eligible for 26 weeks of severance under the enhanced package, where normally I would only receive 10 weeks.

For those of us who qualified for early retirement, we were given a 5-plus-5 package—5 years added to our age and service for pension calculation purposes.

Of the people terminated at Pet, the whole list was kept quite confidential. But of the 12 or so immediate coworkers that I am acquainted with, 8 are over 45 and 7 are over 52.

Being terminated from a position not for a fault or cause is bad enough, but when you are presented with a buyout of your civil rights, it gave me, at least, a feeling of outrage that this sort of thing was happening. And as I found out later, this is even encouraged and advocated by the EEOC. It makes you wonder whose side they are on——

Senator METZENBAUM. How did you find that out?

Mr. GRAHAM. I talked to my lawyer, and I talked to some personnel people in the industry, and they told me that.

Senator METZENBAUM. All right.

Mr. GRAHAM. It makes you wonder whose side they are on and what other civil rights are going to be bought off in the future. This may be the tip of the iceberg.

Maybe I am naive, Senator, but I have always thought that in this great country of ours, a person's legal rights were paramount and could not be purchased or bargained away. I guess I was in error all these years, but I submit to you, sir, that this is not morally or ethically right to be able or forced to do so.

Thank you for your attention.

[The prepared statement of Mr. Graham with an attachment follows:]

PREPARED STATEMENT OF MR. DONALD GRAHAM

Good Morning.

My name is Donald J. Graham, and I am a 55 year old manager caught in the new business fad of "restructuring and downsizing."

I was terminated on December 15, 1987, after having spent 10 years with Pet, Inc., five of which were at the St. Louis headquarters. The previous five years had been with a company purchased by Pet in 1982, namely The William Underwood Company.

At the time of my termination, my position was Director of Product Services for Pet's International Group.

The circumstances surrounding the termination of about 100 of Pet's employees followed the announcement by Karl Bays, the new chairman of I.C. Industries - Pet's parent company, that the operating units were directed to reduce operating costs by $50 million for 1988.

I was informed, by my supervisor, on November 23, 1987, that my position was eliminated; and I would be terminated effective December 15, 1987, the end of Pet's fiscal year. I was informed that I would receive "enhanced" severance and that I qualified for early retirement with "enhanced" benefits.

On December 3, 1987, I attended one of several meetings held by the Human Resources Department for terminated employees to explain the termination procedures and severance packages. There were five people in my meeting. At this meeting, we were given a copy of a "Settlement Agreement and General Release" that we were required to sign if we were to receive "enhanced benefits." Please refer to the heavy print paragraph on the attached copy of the agreement.

We were, at that time, advised to consult our attorney and were not given a definite time limit in which to sign.

I, as did others, consulted an attorney about the release and discussed filing an age discrimination suit. However, my attorney and I concluded that a suit would be a long drawn-out affair; and I required the enhanced package to survive while I looked for a position where I could use my talents and training. I knew that at age 55 it would take quite awhile to land a position; and with one son in college and another in high school, I needed the income.

We also concluded that the benefits, if we won, would probably not be enough to pay the attorney fees that would accrue. A catch 22 situation.

The enhanced severance benefits amounted to about 2 1/2 times the normal severance. I was eligible for 26 weeks of severance under the enhanced package, where normally I would only receive 10 weeks.

For those of us who qualified for early retirement, we were given a 5 + 5 package - five years added to our age and service for pension calculation purposes.

Of the people terminated at Pet, the whole list was kept quite confidential. But of the 12 or so immediate co-workers that I know, 8 are over 45 and 7 are over 52.

Being terminated from a position, not for fault or cause is bad enough; but when you are presented with a buy-out of your civil rights, it gave me, at least, a feeling of outrage that this sort of thing was happening, and as I found out later, even encouraged and advocated by the EEOC. It makes you wonder whose side they are on and what other civil rights are going to be bought off.

Maybe I am naive, but I have always thought that in this great country of ours, a person's legal rights were paramount and could not be purchased or bargained away. I guess I was in error all these years - but I submit to you, Senator, that it is not morally or ethically right to be able or forced to do so.

Thank you.

Settlement Agreement and General Release

This document entered into this _____ day of ___________, 198_, sets forth the terms of agreement between Donald Graham (hereinafter referred to as "Graham") and Pet Incorporated (hereinafter referred to as Pet) regarding the termination of Graham's employment with Pet.

In consideration of the promises made by Pet and set forth below, Graham agrees to the following:

1) Graham will resign from employment with Pet no later than December 15, 1987.

2) Graham will continue working for Pet until the date of his resignation.

3) **Graham releases, discharges and covenants not to sue Pet and its officers, directors, partners, agents, employees, assigns, successors in interest and its parent corporation, IC Industries, Inc. and/or its affiliates, with regard to any matter arising from or connected with his employment with, or termination from, Pet Incorporated for any and all reasons whatsoever, known or unknown, suspected or unsuspected, at law or in equity, which Graham ever had, now has, or hereinafter shall have, including but not limited to any claims which might arise in tort or in contract or under the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964 or under any other law, statute or act whether Federal, State or local. Graham further waives recovery under any claim, action or lawsuit which might be brought on his behalf.**

In consideration of the promises made by Graham and set forth above, Pet agrees to:

1) Pay Graham 26.0 weeks of severance pay for a total amount of thirty-two thousand four-hundred-sixty dollars and no cents ($32,460.00). Payments will be made in accordance with current pay periods, on the 15th and last day of each month. The amount of severance pay due has been calculated to provide payments of $2,705.00 for 12 pay periods. Payments will be made subject to Federal, State and Local taxes, and Pet life, health and dental benefit contributions.

2) Provide Graham with the Pet life, medical and dental benefits coverage for the severance pay period, under the same provisions as if he were still employed.

3) Provide professional employment assistance.

4) One of the following three options:

    a. Add 5 years to Graham age and length of service for pension calculation purposes, subject to a maximum of 65 years of age and 40 years of service, per the current plan; or

b. Estimate social security benefit payable to Graham at age 62, then pay that amount to Graham each month from date of termination until age 62; or

c. Pay Graham his pension at age 65, based on current salary as if working until age 65.

This Settlement Agreement and General Release contains all of the terms and conditions agreed upon by the parties and shall bind each of the parties hereto. No representative of either Graham or Pet had or has any authority to make any representation or promise not contained in this Agreement and each of the parties to this Agreement acknowledges reliance upon any such representation or promise. This Agreement cannot be modified or changed except by a written instrument signed by all of the parties hereto.

If any party to this Agreement commences an action against any other party arising out of, or in connection with, this Agreement or any of the documents executed and delivered at the settlement closing, the prevailing parties shall be entitled to have and recover from the losing party reasonable attorneys' fees and costs of suit as shall be fixed by the court. In witness whereof the parties hereto have executed this Settlement Agreement and General Release, the day and year written above.

1) Graham agrees not to use or import to any other person, corporation or entity any confidential information which he has acquired while an employee of Pet.

2) **Graham, by signing this Agreement acknowledges that he has been afforded an opportunity to review this Agreement with an attorney or other advisors of his choice, that he has read and understands this Agreement and that he has signed this Agreement freely and voluntarily.**

3) This Agreement is made pursuant to and shall be governed, construed and enforced in all respects and for all purposes in accordance with the law of the State of Missouri.

PET INCORPORATED

____________________ By: ____________________
Witness

____

____________________ ____________________
Witness

Senator METZENBAUM. Thank you very much, Mr. Graham.

Our third witness on this panel is William Terrell, from Rochester, NY. We are happy to have you with us, sir.

Mr. TERRELL. Good morning, sir. My name is Bill Terrell, and I am from Rochester, NY.

In 1982, I signed an unsupervised waiver purporting to release all of my claims against my former employer, Xerox Corp. At that time, I was unaware of my legal rights and unaware of potential claims I may have had against Xerox. I would like to briefly tell you what happened to me.

I worked in Rochester for General Dynamics for approximately 17 years. My last position with General Dynamics was that of a supervisor. When General Dynamics moved to California in 1970, I was able to locate another job at Xerox.

I worked for Xerox continuously from 1970 until August 22, 1982. I worked hard for Xerox and was a dedicated employee. I worked there from age 44 until age 56. I feel I did a very good job at Xerox, and my performance appraisals confirmed this.

In 1982, I was forced to leave Xerox on a so-called voluntary reduction in force. At that time, I was advised to attend a group meeting at which I and others were advised that we could participate in a voluntary RIF. We were also told that an involuntary RIF would follow and that the involuntary RIF benefits were substantially less than that which we could receive in the voluntary RIF.

After the meeting, I went up the chain of command, speaking to my supervisors to find out whether I would be terminated in the upcoming involuntary RIF. I was told that I was "part of the numbers" and that "a certain number of people are going to go, and you are going regardless". One of my supervisors also told me "You might win the battle, but you are going to lose the war."

I did not want to leave Xerox. I was age 56, had been with Xerox approximately 12 years, and was earning $28,000 per year as a foreman in charge of stock. I did not have enough savings to retire, and the previous year had undergone a triple bypass operation. I surely did not want to start my career over again, and I knew that the job market in Rochester and the economy in general were terrible in 1982.

I, however, had no choice. I was told in essence that I would be let go in the upcoming involuntary RIF and would receive much less benefits. For example, the voluntary RIF offered three additional months of salary above that provided in the involuntary RIF. Needing these additional benefits and realizing that it might be easier to locate a job before others were fired, I reluctantly accepted the voluntary RIF.

I did so without consulting an attorney. Looking back on the situation, I realize that it might have been to my advantage to obtain legal advice, despite the expense. I did not know my rights or what potential claims I might have had against Xerox. In fact, the waiver form I signed did not mention that I was waiving any specific claims of discrimination, but only stated in general that I was waiving my claims against the company.

I believe that many employees such as myself were in the dark about what was happening to them at the time we were asked to sign the waiver form at Xerox. We were told that the company needed to resize. What we did not realize, and only found out later, was that Xerox let a disproportionate number of older workers go in the reductions in force while at the same time, the company hired thousands of workers, most of whom were extremely young.

I was unemployed for approximately 8 months after I left Xerox, and finally obtained a job selling insurance. My starting salary was only $1,000 per month plus commissions.

To say the least, since I have left Xerox my family has struggled financially. I have also suffered much emotional stress as a result of what occurred to me at Xerox. In fact, in 1986 I had a heart attack, which I truly believe resulted from my employment situation. I am presently disabled and collecting disability pay.

I believe signing the waiver form has hurt me in the *Lusardi* v. *Xerox* lawsuit, which is a class action in Federal court in Newark, NJ. I am a plaintiff in that lawsuit, along with approximately 1,300 other present and former Xerox workers who are alleging age discrimination against Xerox. The trial judge in the *Lusardi* case, Judge Alfred Lechner, ruled I was not "similarly situated" to other class action members because I signed a waiver form. Based in part upon this finding, the Judge decertified the class action.

Judge Lechner's decision has been appealed, and while I am hopeful the Court of Appeals will reverse his ruling, to date I have been hurt by signing the waiver form.

I want to thank you.

Senator METZENBAUM. Thank you very much, Mr. Terrell.

[The prepared statement of Mr. Terrell with an attachment follows:]

PRESENTATION OF WILLIAM TERRELL SENATE SUBCOMMITTEE HEARING

MAY 24, 1988

Good morning, my name is Bill Terrell and I am from Rochester, New York. In 1982, I signed an unsupervised waiver purporting to release all of my claims against my former employer, Xerox Corporation. At that time I was unaware of my legal rights and unaware of potential claims I may have had against Xerox. I would like to briefly tell you what happened to me.

I worked in Rochester for General Dynamics for approximately 17 years. My last position with General Dynamics was that of a supervisor. When General Dynamics moved to California in 1970, I was able to locate another job at Xerox.

I worked for Xerox continuously from 1970 until August 22, 1982. I worked hard for Xerox and was a dedicated employee. I worked there from age 44 until age 56. I feel I did a very good job at Xerox and my performance appraisals confirm this.

In 1982, I was forced to leave Xerox in a so-called voluntary reduction in force. At that time I was advised to attend a group meeting at which I, and others, were advised that we could participate in a voluntary RIF. We were also told that an involuntary RIF would follow and that the involuntary RIF benefits were substantially less than that which we could receive in the voluntary RIF.

After the meeting I went up the chain of command, speaking to my supervisors to find out whether I would be terminated in the up-coming involuntary RIF. I was told that "I was part of the numbers" and that "a certain number of people are going to go and you are going regardless". One of my supervisors also told me that "you might win the battle, but you are going to lose the war."

I did not want to leave Xerox. I was age 56, had been with Xerox approximately 12 years and was earning $28,000 per year as a foreman in charge of stock. I did not have enough savings to retire and the previous year had undergone a triple by-pass operation. I surely did not want to start my career over again and I knew that the job market in Rochester, and the economy in general, were terrible in 1982.

I, however, had no choice. I was told, in essence, that I would be let go in the up-coming involuntary RIF and would receive much less benefits. For example, the voluntary RIF offered three (3) additional months of salary above that provided in the involuntary RIF. Needing these additional benefits and realizing that it might be easier to locate a job before others were fired, I reluctantly "accepted" the voluntary RIF.

I did so without consulting an attorney. Looking back on the situation, I realize that it might have been to my advantage to obtain legal advice, despite the expense. I did not know my rights or what potential claims I might have against Xerox. In fact, the waiver form I signed did not mention that I was waiving any specific claims of age discrimination, but only stated, in general, that I was waiving my claims against the company. Had I consulted an attorney I surely would have been advised of the potential harm my signing of the waiver form could have upon my ability to sue Xerox later for discrimination.

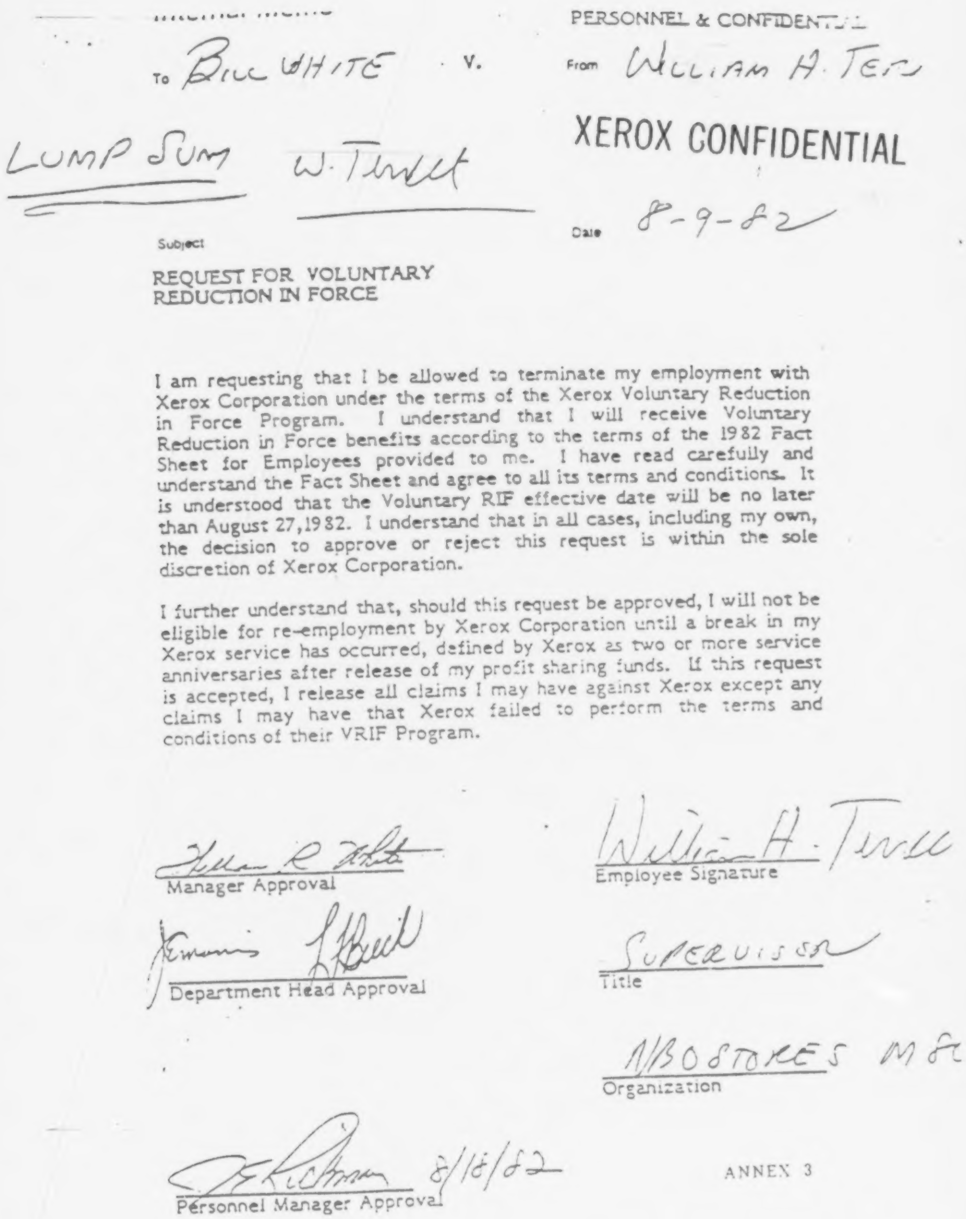
I believe that many employees, such as myself, were in the dark about what was happening to them at the time we were asked to sign the waiver form at Xerox. We were told that the company needed to resize. What we did not realize and only found out later, was that Xerox let disproportionate number of older workers go in the reductions in force while, at the same time, the company hired thousands of workers, most of whom were extremely young.

I was unemployed for approximately eight (8) months after I left Xerox, and finally obtained a job selling insurance. My starting salary was only $1,000 per month plus commissions.

To say the least, since I have left Xerox my family has struggled financially. I have also suffered much emotional stress as a result of what occurred to me at Xerox. In fact, in 1986 I had a heart attack, which I truly believe resulted from my employment situation. I am presently disabled and collecting disability pay.

I believe signing the waiver form has hurt me in the Lusardi v. Xerox law suit, which is a class action in federal court in Newark, New Jersey. I am a plaintiff in that law suit along with approximately 1300 other present and former Xerox workers who are alleging age discrimination against Xerox. The trial judge in the Lusardi case, Judge Alfred Lechner, ruled I was not "similarly situated" to other class members because I signed a waiver form. Based, in part, upon this finding, the judge decertified the class action. Judge Lechner's decision has been appealed and, while I am hopeful the Court of Appeals will reverse his ruling, to date I have been hurt by signing the waiver form.

Thank you.



PERSONNEL & CONFIDENTIAL

To BILL WHITE V.

From WILLIAM H. TER

XEROX CONFIDENTIAL

LUMP SUM W. Terrell

Date 8-9-82

Subject

REQUEST FOR VOLUNTARY
REDUCTION IN FORCE

I am requesting that I be allowed to terminate my employment with Xerox Corporation under the terms of the Xerox Voluntary Reduction in Force Program. I understand that I will receive Voluntary Reduction in Force benefits according to the terms of the 1982 Fact Sheet for Employees provided to me. I have read carefully and understand the Fact Sheet and agree to all its terms and conditions. It is understood that the Voluntary RIF effective date will be no later than August 27, 1982. I understand that in all cases, including my own, the decision to approve or reject this request is within the sole discretion of Xerox Corporation.

I further understand that, should this request be approved, I will not be eligible for re-employment by Xerox Corporation until a break in my Xerox service has occurred, defined by Xerox as two or more service anniversaries after release of my profit sharing funds. If this request is accepted, I release all claims I may have against Xerox except any claims I may have that Xerox failed to perform the terms and conditions of their VRIF Program.

William R White
Manager Approval

William H. Terrell
Employee Signature

Department Head Approval

SUPERVISOR
Title

NBOSTORES MGR
Organization

8/18/82
Personnel Manager Approval

ANNEX 3

XEROX CONFIDENTIAL

ADDITIONAL INFORMATION

All specific questions should be directed to your manager, your personnel representative, or the Manager of RMG Benefits, Policies, and Records.

I have read carefully and understand this "Fact Sheet."

J. H. [illegible]
Employee Signature

8/17/82
Date

This page of the "Fact Sheet for Employees" must be signed and returned with the employee's VRIF request.

Internal Memo

XEROX CONFIDENTIAL

3471 APC/860/S-5

To

All NBO Salaried Employees

From

R. A. Sternberg

RMG/NAMD/New Build Operations
Building W200-1G
Extension 24062

Subject:

Voluntary Reduction in
Force Announcement

Date

July 15, 1982

As we drive to meet significant competitive benchmark targets, it is unfortunately necessary to continue our manpower reduction. Part of these reductions, and hopefully most of them, will be achieved with the Voluntary Reduction in Force announced today. The Voluntary Reduction in Force is offered to assist interested employees in pursuing other employment and/or retirement alternatives. It will also benefit employees who remain, by reducing and minimizing the scope of our manpower surplus.

The Program has been tailored to meet the needs/requirements of both RMG and NBO. Although most salaried employees are eligible to participate, the following RMG restrictions/exclusions apply:

- Secretaries
- Electrical/Electronic Engineers
- Part-Time Employees
- Technicians/Engineering Aides

In addition, the Company reserves the right to deny participation to individuals considered essential to our future.

Detailed information relating to the VRIF is available from your manager and/or Personnel. Additionally, informational meetings will be held on July 19 and August 10 in the Building 105 Auditorium at 1:30 p.m. If you are interested in attending, please contact your manager.

Eligible employees may submit their request during the period of July 15, through August 11, 1982. Most requests will be approved or denied by August 23, 1982, and employees with approved requests will depart by August 27, 1982.

RAS:sf

ANNEX 1

XEROX CONFIDENTIAL

1982

VOLUNTARY REDUCTION IN FORCE

FACT SHEET

FOR EMPLOYEES

PROGRAM

To help balance manpower levels, the Company is providing employees the opportunity to pursue a Voluntary Reduction in Force. This Fact Sheet summarizes only the personnel policy concerning a Voluntary Reduction in Force. Any other personnel issues will be resolved in accordance with the appropriate Xerox policy or practice.

PROCESS

Employees interested in obtaining additional information, or who wish to submit a formal request to participate, should contact their Manager or their Personnel representative. Submission of a request does not guarantee approval as the company reserves the option to reject VRIP requests as its needs dictate. The company will attempt to approve or deny all requests within 3 weeks.

SALARY PAYMENT OPTIONS

Employees who request and are approved for the voluntary reduction are eligible for salary continuance in accordance with the schedule shown below:

Months Salary Continuance*

	Age		
Length of Service	Under 40	40-49	50 & Over
Less than 1 year	1	1.5	2
1 but less than 4 years	2	3	4
4 but less than 8 years	4	6	8
Over 8 years	6	9	12

For example, an employee under 40 with 5 years of service, whose last day worked was March 15 would receive salary and benefits continuance through July 15.

* Employees on Confidential Payroll receive 6 months' salary continuation or the schedule, whichever is higher.

ANNEX 2

Salary Payment - The amount of salary continuance shall be the employee's full salary in effect immediately prior to the start of salary continuance. State unemployment benefits should not be payable because the employee has voluntarily terminated and is receiving full salary. However, in the event such payment is made, an amount equal to the state benefit will be deducted from the employee's salary.

Lump Sum Payment - Employees approved for the voluntary reduction program are guaranteed the salary provided for in the schedule shown on page 1 of this Fact Sheet, and may elect to receive the payment in lump sum at any time they wish. This option is not and will not be available under an Involuntary Reduction Program.

EXTENDED SALARY CONTINUANCE - TRANSITION TO RETIREMENT

The Voluntary Reduction in Force Program may provide some employees the opportunity to bridge the transition into retirement. At the conclusion of the salary continuance period, employees who have reached age 55 with at least 10 years of service will be eligible for retirement benefits.

Employees who have reached their eighth anniversary or more, who are at least 51-1/2 and who choose to utilize this program as a transition to retirement will be granted an added 3 months of pay to their normal continuance of 12 months, thus providing a benefit of 15 months of continuance.

In addition, such a person may also choose to receive their 15 months over a period of 30 months and thus, bridge to retirement by electing the Profit Sharing Release Date of 12 months from the end of continuance (see Profit Sharing Release Date, Page 5). Employees considering this option should see their Personnel Representative.

WORK SCHEDULE

At the discretion of the Manager, employees may be asked to work during the salary continuance period. In such case, employees must be allowed as much time off with pay as may be required for the purpose of seeking other employment. Eligibility for salary continuance is not affected by an employee's work schedule.

RELOCATION

Relocation assistance will not be provided to any employee who volunteers for reduction in force.

MORTGAGE INTEREST DIFFERENTIAL

No further payments are made following the end of salary continuance.

OTHER EMPLOYMENT

When an employee obtains other employment during the salary continuance period, the employee is responsible for notifying Xerox so that arrangements can be made to forward any remaining salary continuance in lump sum. This option is not and will not be available under an Involuntary Reduction Program.

SEVERANCE

Employees are not eligible for additional severance pay beyond salary continuance.

REINSTATEMENT ELIGIBILITY

Employees who volunteer for the VRIF shall not be eligible for re-hire until there is a break in service following the end of the Profit Sharing extension. Break in service is defined as missing 2 or more service anniversary dates.

TERMINATION DATE

The termination date is the day salary continuance ceases, the date the employee begins other employment, or the date employee elects lump sum payment, whichever occurs first.

SALARY PAYMENTS

During the salary continuance period, your salary payments will continue to be deposited in your bank or sent directly to your home, according to your present arrangements. If you wish it changed, please advise your Personnel representative.

BENEFIT MODIFICATIONS DURING SALARY CONTINUANCE

You are covered under the provisions of the Xerox Family Security Plan (including the Xerox Employee Assistance Program) but with the following modifications:

- Life Insurance - If you reach your third anniversary while on salary continuance, coverage does not increase. Life Insurance is reduced by the normal one-third if you reach your 55th birthday during salary continuance.
- Travel Accident Insurance - Coverage ceases on termination of active employment and commencement of salary continuance. However, employees are covered should they be actively at work and traveling on Company business during the salary continuance period.
- Disability Plans - During salary continuance you are not eligible for coverage under the short-term or long-term disability plans.

BENEFITS FOLLOWING TERMINATION

- Medical Care - Your medical care benefits end on your last day of salary continuance. (However, in the event of total disability of a covered dependent, coverage may be extended for the particular disability through the end of the year following the year in which salary continuance ends.) You may convert to a more limited individual health insurance policy. If you wish to convert, obtain a conversion form from Personnel and submit it within 31 days from the date your salary continuance ends.

- Dental Plan - Coverage ceases on your last day of salary continuance. There is no provision for converting to an individual policy.

- Life Insurance - Your life insurance coverage ceases on your last day of salary continuance. However, benefits are payable if death occurs within 31 days from this date.

  You may convert your coverage to an individual life insurance policy at standard rates without a medical examination provided application is made within 31 days from your termination date. The premium you pay depends on your age and the type of policy chosen. (You cannot, however, convert to a term type of policy.) Application may be made to any agent of the Metropolitan Life Insurance Company or Prudential Insurance Company of America. (NOTE: You may be able to obtain a more appropriate policy, or better premium rate, through another company.)

- Vacation - You will receive pay in lieu of any unused vacation entitlement at the start of your salary continuance, unless you specifically request such payment at the end of continuance. (Vacation may not be used to extend salary continuance.) If your salary continuance period extends into the following year, you will not be entitled to additional vacation.

XEROX PROFIT SHARING & RETIREMENT INCOME GUARANTEE PLANS

Your Xerox Profit sharing consists of two parts - Savings and Retirement. You are always 100% vested in the Savings part. You are vested in the Retirement portion according to your length of service. You may also be vested in the Retirement Income Guarantee Plan. The vesting schedules are as follows:

VESTING SCHEDULE #1

Anniversary	Vesting in the Retirement Account
1st	0%
2nd	25%
3rd	50%
4th	75%
5th	100%

New employees joining Xerox after December 31, 1980 will start vesting in the Profit Sharing Retirement Account after completing five years of employment and will become fully vested after 10 years, according to the following schedule.

VESTING SCHEDULE #2

Anniversary	Vesting in the Retirement Account
Under 5 years	0%
5th	50%
6th	60%
7th	70%
8th	80%
9th	90%
10th	100%

All employees reaching age 65 are 100% vested under Schedule #1 and #2.

EXTENSION OF PROFIT SHARING PARTICIPATION

NOTE: This option is available only for those electing the salary continuance method (Receipt of a lump sum at any time during continuance always requires immediate payout of profit sharing benefits to terminating employees).

- **Extension of participation** - Upon going on voluntary layoff status, your Employee Profile will be prepared to reflect a Profit Sharing Release Date of up to one (1) year from the end of your salary continuance. There are four reasons why it is advantageous to extend your participation in Profit Sharing and Retirement Income Guarantee Plans for up to a one year period. They are:

  1. The Company's profit sharing distribution for the calendar year is available only to those who are participants at the end of the calendar year. (The distribution, of course, is based on earnings and salary continuance actually paid during the calendar year.)

  2. Participation through an extra anniversary date may improve an employee's vesting in either plan.

3. Participation through the 10th anniversary or 55th birthday may satisfy the requirements for Retiree Medical, Dental, Life Insurance and Survivor Income benefits.

4. Company service is credited through the last day of participation for purpose of determining your service should you be rehired.

You may, if you wish, waive this one year extension at any time and receive your money sooner by contacting your Personnel Representative and confirming the new date in writing.

If you wish, additional information regarding this option, you should call your Personnel representative.

- Distribution - Non-Retirement - At the end of your participation, amounts due from the Profit Sharing Plans will be paid to you as a lump-sum or annuity if you so choose. Contact your personnel office if you are interested in the purchase of an annuity. If you take a lump-sum you may roll it over into a tax sheltered Individual Retirement Account (IRA) within sixty days of the distribution. You cannot "roll-over" employee contributions, therefore the payroll deductions to the Employee Savings Account must be excluded. IRAs can be purchased through banks, insurance companies and other financial institutions. Any amount withdrawn from the IRA prior to age 59-1/2 is subject to ordinary income tax and a 10% penalty tax.

- Distribution - Retirement - If your participation ends after you have reached your 55th birthday and 10th service anniversary, retirement account funds are used to provide a guaranteed monthly retirement income. Consult your Personnel office for further information on retirement and income annuity options.

RETIREMENT INCOME GUARANTEE PLAN (RIGP)

If you have ten years of service at the time you cease participation in the Xerox Profit Sharing Plan you are vested in RIGP. A calculation of your minimum guaranteed retirement benefit will be made and any payments due will be made in the form of a lump sum for terminating employees or a increase in the retirement annuity purchased for retiring employees.

INFLATION ADJUSTMENT PLAN (IAP)

Effective January 1, 1983, the Inflation Adjustment Plan (IAP) will provide for matching of up to 1-1/2% of the annual Optional Profit Sharing contribution based on actual salary earnings. IAP also guarantees a minimum 3-1/4% inflation adjustment for retired employees at age 65. Employees accepting a Voluntary RIF will receive the matching 1-1/2% only if their profit sharing participation continues on or after January 1, 1983. The guarantee of 3-1/4% inflation adjustment is available to only those employees who retire after January 1, 1983. In all cases, you must have ten years credited service in order to be vested in IAP.

TUITION AID

If you were attending classes prior to approval of voluntary layoff, you will be reimbursed for your tuition according to the Company's tuition policy even though the semester extends beyond the salary continuance period. Upon termination, you are no longer obligated to repay outstanding tuition aid advances. (NOTE: No tuition reimbursement will be made for classes beginning after approval of the voluntary layoff.)

STATUTORY BENEFITS

- New York or Connecticut State Unemployment Compensation - Since this program is strictly voluntary, in our opinion, participants would not be eligible for New York or Connecticut State unemployment compensation.

- Social Security - Based on the experience of employees who have volunteered for reduction in force in the past, you may qualify for Social Security. If you are age 62 and otherwise qualify, you will be eligible for retirement benefits because you will not be receiving pay for work performed. Further, if you are age 62, and otherwise qualify, you will not be required to pay FICA taxes during salary continuance. In 1982 this tax is 6.7% on $32,400. For full details of Social Security benefits you should call the Social Security office at 359-3190.

PRIORITY OF INFORMATION

In case there are inconsistencies or ambiguities relating to the terms and conditions of this VRIF, they shall be resolved by reference to the following sources in this order: (1) Xerox Family Security Plans; (2) The 1982 VRIF Fact Sheet for employees; (3) Xerox personnel policies; (4) The employee handbooks "You and Xerox" and "Retirement at Xerox", and (5) Written communications from Xerox personnel and line management.

ADDITIONAL INFORMATION

All specific questions should be directed to your manager or your personnel representative.

I have read carefully and understand this "Fact Sheet."

Signature ______________________________

Date ______________________________

Senator **Metzenbaum**. Mr. Marans, you stated that three other older employees were also asked to sign this waiver form in July 1987 as a prerequisite to receiving severance pay.

Do you know if they signed?

Mr. **Marans**. Yes, they did sign this agreement.

Senator **Metzenbaum**. Do you know why they decided to sign?

Mr. **Marans**. Well, it was quite obvious. They were in the age group of about 45 to 55. They had children in college or in high school, approaching college age. They had substantial mortgages on their houses. They needed time to relocate. And in addition to that, you need a reference, particularly when you are in a fairly closed industry such as the chemical industry. If you don't have a good reference, your chances of getting another job become negligible. And this was one of the methods that Grace used to force people to sign, because they said, "Look, you don't get a reference, without signing this." And that's a very persuasive argument because it shuts you out of the job market for an indefinite period of time.

Senator **Metzenbaum**. Did you find other employment after you left the company?

Mr. **Marans**. No. I have looked for employment during the past year. I have sent out about 100 letters. Obviously, at this age, of course, it is very difficult to obtain a job.

Senator **Metzenbaum**. Has the company given you a favorable reference?

Mr. **Marans**. I don't think we've ever gotten to that stage.

Senator **Metzenbaum**. Do you have a case pending with the EEOC?

Mr. **Marans**. Yes, I do have a case pending with the EEOC.

Senator **Metzenbaum**. And you are not at all optimistic, because one of the investigators indicated to you that the case isn't going anywhere?

Mr. **Marans**. That's correct. In other words, essentially he said that Grace has been spoken to, has stonewalled, and that EEOC only carries on a very limited number of cases to trial and therefore he says that probably you'll have to go to the outside if you want to try to get satisfaction. Since that time, I have hired a lawyer, and I will press the case.

Senator **Metzenbaum**. Do you feel a sense of letdown that your own Government has turned its back on you?

Mr. **Marans**. Well, yes, of course. I think that's obvious, that you do feel that, because you feel that there is a certain protection that the Government should give you as a taxpayer, and certainly, I have not received that protection. I have generated a tremendous amount of work on my own to present a case before the EEOC, writing them four letters consisting of anywhere from 4 to 20 pages in length; I have given them a large amount of information that I thought would be valuable to them besides that; and of course, I see the case essentially dead in the water. That is discouraging.

Senator **Metzenbaum**. Thank you.

I have some questions for the other witnesses, but we have been joined by Senator Stafford, who is discriminating against the Senate by leaving us at the end of the year, and I feel abused in that respect. He has performed so well in this body and has been such a giant that we indeed are going to miss his presence.

Senator Stafford, do you have an opening statement?

Senator **Stafford**. I do not, Mr. Chairman, but thank you for those very gracious words, and I can tell you it has been a great pleasure to work with you through the years, and I shall miss this place a great deal—and frankly, I am interested in the employment opportunities, rights and welfare of people getting on in years, because when I think about it, I'm getting on in years myself.

Senator **Metzenbaum**. No way. Time stops for you, Senator Stafford.

Senator **Stafford**. But I thought it would be particularly appropriate if I came by here myself. As a final footnote, I'll say that occasionally when I'm at home—and Vermont is the State I represent—at almost 75 years of age, I find I am talking to senior citizen groups who often are younger than I am. So I am here to listen.

Senator **Metzenbaum**. Thank you very much, Senator Stafford. We are delighted to have you with us.

Mr. Graham, you have gotten a pretty good deal in exchange for signing a waiver—at least, some might claim that you have a good deal. Why are you so incensed about being required to sign?

Mr. **Graham**. Well, I guess there are a couple of answers to that, Senator. One is yes, I got a relatively good deal; it's not as good as working. But to get that deal, I had to sign away the rights that I could sue the company for age discrimination if I could prove that they did that. And to me, that's a travesty, to have to sign away a right. And as I said in my statement, maybe I am naive, but I have always thought, I guess, and I have tried to teach my sons this, that your civil rights are paramount; they are yours, and you can't give them away, and you can't sell them. But apparently, I'm wrong, because these waivers in effect, you are selling your civil rights.

Senator **Metzenbaum**. Before this termination occurred, you actually had a pretty high position with the company, did you not? Would you tell us what your responsibilities were and what your title was, again?

Mr. **Graham**. Yes. I was director of product services for Pet's International Group. In essence, I was technical director in charge of product development, quality assurance, regulatory affairs, technology transfer for the international portion of Pet.

Senator **Metzenbaum**. And your salary was?

Mr. **Graham**. Just under $65,000.

Senator **Metzenbaum**. Were you taken by shock when they came to you and asked you to voluntarily retire and waive your rights?

Mr. **Graham**. Yes, sir, I was, for the simple reason I had received a 7-percent merit increase in July, and everything seemed to be going fine. I had undertaken a fair amount of responsibility in working on a number of projects, which I don't know what happened to them after I left, but they were important to the company—at least, that's what they told me. And I felt that as well.

Senator **Stafford**. Mr. Chairman, may I ask a question?

Senator **Metzenbaum**. Yes.

Senator **Stafford**. Mr. Graham, if you had refused to sign the waiver, what would have happened in that event?

Mr. **Graham**. In that event, I would have been cut off at 10 weeks of severance versus the 26 that I received, and I would also have been given a very small retirement benefit. By signing the waiver, I was given a 5-plus-5 package on retirement.

Senator **Stafford**. How much in dollars did it make a difference to you in terms of your pension?

Mr. **Graham**. On pension, it probably amounted to about $700 to $800 per month difference. On severance, it amounted to about $20,000.

Senator **Stafford**. Thank you.

Senator **Metzenbaum**. Mr. Graham—and Mr. Marans—you may both want to answer—you have certain rights under the law. Do you think there is something sort of un-American about a major American company asking you to sign a waiver of your rights under the law?

Mr. **Marans**. Well, actually it was more than even a waiver of my rights. Under paragraph 2 of the agreement, they essentially said that I could not speak of anything. They said that anything they would consider to be detrimental to the company, no matter what it was, was cause for stopping the payment immediately and for suing me in addition. So in other words, they were threatening my civil rights in a way, aside from the waiver, and of course the waiver, which was in paragraph 8, was of the same type, where they actually said if you disclose the waiver, if you even indicate to anybody that you have signed a waiver, we can take back everything we've given you, and we can sue you for anything we wish to.

I was the only one, I think, within the entire company who has refused to sign this agreement. It was supposed to be confidential; it is no longer confidential.

Senator **Metzenbaum**. The W.R. Grace Co. is headed up by Peter Grace.

Mr. **Marans**. J. Peter Grace; the same.

Senator **Metzenbaum**. The same man who was the head of the President's Commission on Efficiencies in Government, if I remember correctly.

Mr. **Marans**. That is correct. And in fact, I wrote to him after I was fired and disclosed the entire story, and what he did was he bounced it back to the man who was president of the Research Division, who sent me this letter saying essentially, well, that's life.

Senator **Metzenbaum**. Do you have a copy of that letter?

Mr. **Marans**. Yes; I have copies of the letter. I have copies of all my letters.

Senator **Metzenbaum**. I'd like to have a copy of all the correspondence you had with Mr. Grace and the W.R. Grace Co. for the record; would you supply them to us, please?

Mr. **Marans**. Yes, I shall.

Senator **Metzenbaum**. Mr. Graham, I think I will ask you the same question. Let us all assume for the moment that this was a discrimination case against a black or a Hispanic or a woman who was pretty much in the same category. Do you think there is something un-American about a company asking you to sign away your rights under the law, under pressure tactics, when they know that they pretty much have you over a barrel. You need the extra retirement pay. You need the increase in your pension rights.

What kind of reaction do you have as a human being? You were not low-level management; you were high-level management. I just would like to get your reaction, Mr. Graham.

Mr. **GRAHAM**. My first reaction was complete outrage, because I did believe it was un-American. I was not aware your civil rights could be contractual. I believe somebody said "inalienable rights"; I thought they were inviolate from that standpoint.

I was angry, very angry, and that's why I first contacted AARP, to see where they stood on the matter. I knew I was caught, that I had to sign this waiver in order to get those enhanced benefits, because all the experiences of friends and colleagues in the business world who have been put out on the street at age 55 or older, it has taken them a long time, sometimes over a year, to find another position where they could support their families.

I worked very hard for 26 years in the food industry, with basically two companies, and I felt that to be put out on the street and have to sign away my civil rights just to exist while I found another job was not ethically right.

Senator **METZENBAUM**. You mentioned nine other older workers who were offered the same type of deal. To your knowledge, did they sign the waivers?

Mr. **GRAHAM**. Yes, sir, they did sign the waivers. Two or three of them held off until the last possible minute, and they got a very nasty letter from the company saying if they don't sign it and get it back, their enhanced benefits would not commence. This was about at the end of the normal severance period which is under company policy.

Senator **METZENBAUM**. Do you happen to have a copy of one of those letters by any chance?

Mr. **GRAHAM**. No, I do not, Senator.

Senator **METZENBAUM**. Thank you.

Mr. Terrell, you were technically a voluntary retiree. Do you feel that your retirement was actually voluntary in the real sense of the word?

Mr. **TERRELL**. No, under no condition.

Senator **METZENBAUM**. Why do you say that?

Mr. **TERRELL**. Well, I was told that I was "part of the numbers" and that I was not going to escape the involuntary RIF. I was told that I could win the battle, but I would lose the war.

When you hear statements like this, the handwriting is on the wall, so to speak.

Senator **METZENBAUM**. Could you pull the mike closer and repeat that last comment you made, please?

Mr. **TERRELL**. OK. Like I said, I was told by one of my supervisors that I would win the battle, but lose the war. That more or less put the handwriting on the wall. They told me I was "part of the numbers"; that I had been stacked with other people, other foremen, and where I was situated, there was no chance of me surviving the involuntary RIF.

Senator **METZENBAUM**. Have you taken the matter up with EEOC about the compulsory nature, the fact that you had to sign the waiver?

Mr. **TERRELL**. No, sir. I was in the dark. When I signed the waiver for Xerox back in August 1982, I was in the dark. I really didn't know what my rights were. I wish I had consulted a lawyer. I did not. I feel that I am being penalized now for it. But of course, like I say, only time will tell how much damage I have done by signing the waiver.

Senator METZENBAUM. How much time did they give you to look this waiver over before you signed it?

Mr. TERRELL. It wasn't very much time. I don't recall exactly if it was in hours or days, but it was not a very long time, I can tell you that right now.

Senator METZENBAUM. What is your attitude about the requirement to sign a waiver of your rights under the law, do you think there is something un-American about that?

Mr. TERRELL. Can you repeat that, Senator?

Senator METZENBAUM. I said, do you think that their requiring you to sign this waiver of your rights is somewhat un-American?

Mr. TERRELL. I feel very strong about that. Now that this has happened, and I have thought about it over the last 6 years, I feel definitely that they have violated my rights.

Senator METZENBAUM. It is very disturbing. The case is still pending for the other 1,300 employees?

Mr. TERRELL. Yes, *Lusardi,* yes, it is still pending.

Senator METZENBAUM. But you've been excluded because the court has decertified you since you had signed a waiver?

Mr. TERRELL. I don't know the answer on that right at this time.

Senator METZENBAUM. As I understand it, the judge decertified the entire class.

Mr. TERRELL. Yes.

Senator METZENBAUM. You indicated that that was one of the reasons; he didn't just decertify you.

Mr. TERRELL. Yes.

Senator METZENBAUM. I want to say that this testimony has been particularly eloquent. It is a clear illustration of how waivers undermine the rights of older workers. It is hard to believe that the EEOC is working to encourage this development, and it causes those of us who have been supportive of this kind of legislation to worry and be concerned about whether or not the Government agencies charged with enforcing the law are actually aiding and abetting the undermining of the law.

I want to thank the three witnesses. In addition to the three witnesses who have testified, I have letters from two other older employees who reluctantly signed waivers of their ADEA claims as part of an exit incentive program.

I am introducing into the record at this point letters to the Subcommittee from Robert Patterson, of Rochester, NY—a former employee at Xerox—and Vincent Cirillo, of Broomall, PA, formerly with ARCO. Without objection, the letters will be included in the record in their entirety.

[The letters referred to above follow:]

Robert C. Patterson
21 Antlers Drive
Rochester, N. Y. 14618

STATEMENT

To the Senate Labor Subcommittee:

Only the fact that I have been either out of work or underemployed for the past five and a half years and just began a job as a temporary contract draftsman, prevents me from appearing in person before you at this hearing.

I am sending you this statement to beg you to continue to suspend the EEOC rule which attempted to legalize waivers of age discrimination rights signed by workers upon termination or early retirement. I pray you will eventually vote to abolish this rule. I am a victim of forced early retirement and a signer of such a waiver or release form. Here is my story:

June 26, 1967 - I began work at Xerox as a Tool Designer. Promoted in 1969 to Associate Plant Layout Engineer; in 1970 promoted to Production Foreman. Became a Senior Facilities Design Draftsman in 1974.

Nov. 1, 1982 - General meeting for Bldg. 304 engineering personnel, Webster, N. Y. Told about a Voluntary Reduction in Force (VRIF) offer. Those interested were to contact their Manager. On return to drafting room, Reuben Black, age 61, and myself, age 55, were given VRIF fact sheets by head of drafting. We both decided we were not interested in early retirement.

Nov. 3, 1982 - The head of Bldg. 304 Engineering, Warren Zimmer, came into the drafting room, something he rarely did. He came straight to Black and me and asked if we had received the VRIF info. This was so suspicious that Black asked Zimmer, "Who is on the layoff list?" Zimmer said there was no such list but Black insisted there had always been such lists in the past. We suggested that Zimmer check with his boss about a potential layoff list.

Nov. 4, 1982 - Zimmer told Black and me he had checked with his boss and there was a layoff list and we were on it. He strongly advised us to take the VRIF. I went back into his office a half hour later to make sure I understood the counselling advice I had received from him. I asked, "If I don't volunteer for the VRIF, what chance do I have of being laid off?" He replied, "There is a 99% sure chance that you will be laid off."

Nov. 15, 1982 - Six working days after I had been told I had a 99% sure chance of being laid off, and still in shock at the turn of events, I signed to take the VRIF.

Nov. 30, 1982 - Final day of work. I was out the door.

STATEMENT - continued

Reasons for "volunteering" for Early Retirement

I had been told by my Manager that I was on a layoff list and if I did not "volunteer" to take the VRIF my chances of being laid-off were 99% sure. Thus, I was faced with a choice of two evils. If I applied for VRIF leading to early retirement, I would have 15 mos. pay and retain my medical and dental benefits. Under the Involuntary Reduction in Force (IRIF), I would only receive a maximum of 12 mos. pay. Either way, I would have no job. Under these circumstances, my wife and I decided that I had no other choice but to take the VRIF. My wife was nearly 62, with no social security coverage of her own, so at our ages, the medical and dental benefits were vital, and at a time of high unemployment, we needed the extra 3 mos. pay while I tried to find another job.

There was nothing "voluntary" (in the true sense of the word) in my taking the VRIF. No one would willingly give up, at the age of 55, a job paying $32,000 a year, four weeks paid vacation, 12 paid holidays, and a $121,000 life insurance policy in exchange for an early retirement pension estimated at that time to be only $270 a month!

Furthermore, the VRIF fact sheets stated that "Employees .... who wish to submit a formal request to participate should contact their Manager ...." I did not contact my Manager. Instead, my Manager, Zimmer, sought me out. It was intimidation, pure and simple on the part of Xerox towards the older employees.

Reasons for Signing the Release or Waiver Form

The release or waiver was only the final sentence of Xerox's Request for Voluntary Reduction in Force form.

I had only 11 days after being told I was on a layoff list, to make the decision to take the VRIF. Even though I was still in a state of shock, I debated whether I should sign this form as being "Under Protest". I decided against it for the following important reason:

> As you will note on Page 1 of the VRIF offer under Process, it states "...the Company reserves the option to reject VRIF requests..." I felt that if I signed the form "Under Protest", Xerox would simply refuse my so-called "request" and then terminate me later in an Involuntary Reduction in Force (IRIF). Since I had already been told by my Manager on Nov. 4 that I was on a layoff list and my chances of being laid off were "99% sure", I could not risk a protest. I would have been laid off in Dec. with 3 mos. less extended salary and no insurance, medical or dental benefits.

This was a perfect "Catch 22" situation. I signed the Request (and release) form with the equivalent of a loaded gun being held to my head by Xerox Corporation.

STATEMENT - continued

Reasons for Signing the Release or Waiver Form - continued

The AARP in its News Bulletin of December 1987 writes, "Consider carefully any releases you are asked to sign that require your waiving certain rights, particularly under ADEA, in exchange for a special benefit package or a settlement. Attorney Raymond Fay, who is representing AARP in several age discrimination cases, suggests that persons should request sufficient time to examine a release or waiver and to consult with an adviser about its terms." My own situation which I have just described to you did not allow me any reasonable amount of time before making a life-changing decision. I was also in a no-win situation where I did not have the option of obtaining advice or refusing the offer.

I hope that Congress will consider ways in which they can protect workers from being intimidated by companies into taking offers they do not really want to take or signing releases under coercion. The EEOC must not be allowed to legalize these waivers. They will only make it easier for employers to discriminate.

Failure of the EEOC to Do its Job

On June 22, 1983 I filed an Age Discrimination Charge against Xerox with the EEOC. 60 days then elapsed without the EEOC or Xerox making any attempt at reconciliation. As a result, I became a named plaintiff in the Lusardi et al vs. Xerox class action suit on October 6, 1983.

Numerous phone calls to the EEOC offices in both Buffalo and Washington brought only the reply, "We're working on it." It was only after the members of our suit started a mammoth letterwriting campaign to members of Congress complaining about the inaction at the EEOC, combined with complaints from many other workers across the country, that the Senate Special Committee on Aging, headed by Senator John Melcher, began holding hearings on the EEOC. The close scrutiny and reprimands of this committee resulted in the EEOC doing an about-face concerning the Lusardi vs. Xerox case. They have now filed a brief in our behalf; five years after we first asked them them for help!

The House has also launched its own investigation of the EEOC. The House Select Committe on Aging, chaired by Edward Roybal, has uncovered many other failures of the EEOC to discharge the duties it was charged with by Congress.

In view of the many failures of the EEOC to live up to its congressional mandate to protect workers from discrimination, it is imperative that they not be allowed to refrain from monitoring the waivers which companies are forcing workers to sign. I ask your committee to be as diligent and aggressive as the Senate and House Committees on Aging were in investigating the EEOC. The waivers are a vital issue to thousands of workers. We need your help.

Robert C. Patterson

Robert C. Patterson

PATTERSON

11/4 [illegible]

11/15 ← Last Day for [illegible]

II

RMG

VOLUNTARY REDUCTION IN FORCE

FACT SHEET FOR SALARIED EMPLOYEES

WHO MAY CURRENTLY RETIRE OR BRIDGE TO RETIREMENT

11/82

[illegible] 11/26

PROGRAM

To help balance manpower levels, the Company is providing employees, who may currently retire or bridge to retirement, the opportunity to pursue a Voluntary Reduction In Force. This Fact Sheet summarizes only the personnel policy concerning a Voluntary Reduction In Force. Any other personnel issues will be resolved in accordance with the appropriate Xerox policy or practice.

PROCESS

Employees interested in obtaining additional information, or who wish to submit a formal request to participate, should contact their Manager or their Personnel representative. NOTE: Submission of a request does not guarantee approval as the Company reserves the option to reject VRIF requests as its needs dictate. The Company will attempt to approve or deny all requests by 11/26/82.

SALARY PAYMENT OPTIONS/INCENTIVES

To assist employees in pursuing retirement, this Voluntary Program offers special incentives not available to employees affected by an Involuntary Reduction.

An extra 3 months of pay to the normal continuance of 12 months is included to provide a total benefit of 15 months salary continuance. In addition, several payment options are available, and employees are guaranteed their full salary continuance.

Salary Payment - The amount of salary continuance shall be the employee's full salary in effect immediately prior to the start of salary continuance. State unemployment benefits should not be payable because the employee has voluntarily terminated and is receiving full salary. However, in the event such payment is made, an amount equal to the state benefit will be deducted from the employee's salary.

Lump Sum Payment - Employees approved for the Voluntary Reduction Program are guaranteed their 15 months of salary continuance and may elect to receive the payment in lump sum at any time they wish.

Extended Salary Continuance - Transition to Retirement
The Voluntary Reduction In Force Program may provide some employees the opportunity to bridge the transition into retirement. At the conclusion of the salary continuance period, employees who have reached age 55 with at least 10 years of service will be eligible for retirement benefits.

A half-pay option to provide salary and benefits continuance for 30 months is available. The extension of salary continuance to 30 months through this half-pay option and the further extension of Profit Sharing participation for up to an additional 12 months will provide many employees the opportunity to bridge to retirement.

WORK SCHEDULE

Employees will not normally be asked to continue working during the salary continuance period. Exceptions may be made for unusual circumstances, but only with the approval of Division Personnel.

RELOCATION

Relocation assistance will not be provided for any employee who volunteers for reduction in force.

MORTGAGE INTEREST DIFFERENTIAL

No further payments are made following the end of salary continuance.

OTHER EMPLOYMENT

When an employee obtains other employment during the salary continuance period, the employee is responsible for notifying Xerox so that arrangements can be made to forward any remaining salary continuance in lump sum.

SEVERANCE

Employees are not eligible for additional severance pay beyond salary continuance.

REINSTATEMENT ELIGIBILITY

Employees who volunteer for the VRIF shall not be eligible for re-hire until there is a break in service following the end of the Profit Sharing extension. Break in service is defined as missing 2 or more service anniversary dates.

TERMINATION DATE

The termination date is the day salary continuance ceases, the date the employee begins other employment, or the date employee elects lump sum payment, whichever ocurs first.

SALARY PAYMENTS

During the salary continuance period, your salary payments will continue to be deposited in your bank or sent directly to your home, according to your present arrangements. If you wish it changed, please advise your Personnel representative.

BENEFIT MODIFICATIONS DURING SALARY CONTINUANCE

You are covered under the provisions of the Xerox Family Security Plan (including the Xerox Employee Assistance Program), but with the following modifications:

> Life Insurance - Your coverage continues during salary continuance based on the salary continuance received. (Note that in the case of those receiving half pay over 30 months, life insurance coverage would also be one half normal). If you reach your third anniversary while on salary continuance, coverage does not increase. Life Insurance is reduced by the normal one-third if you reach your 55th birthday during salary continuance and reduced to 2 1/2 times salary continuance if you reach your 65th birthday during salary continuance.
>
> Travel Accident Insurance - Coverage ceases on termination of active employment and commencement of salary continuance. However, employees are covered should they be actively at work and traveling on Company busines during the salary continuance period.
>
> Disability Plans - During salary continuance you are not eligible for coverage under the short-term or long-term disability plans.

Additionally, please note you are not covered by any Xerox benefit programs during the Profit Sharing Extension Option described later in this Fact Sheet on Page 5.

BENEFITS FOLLOWING TERMINATION

Medical Care - Your medical care benefits end on your last day of salary continuance. You may convert to a more limited individual health insurance policy. If you wish to convert, obtain a conversion form from Personnel and submit it within 31 days from the date your salary continuance ends.

Dental Plan - Coverage ceases on your last day of salary continuance. There is no provision for converting to an individual policy.

Life Insurance - Your life insurance coverage ceases on your last day of salary continuance. However, benefits are payable if death occurs within 31 days from this date.

You may convert your coverage to an individual life insurance policy at standard rates without a medical examiniation provided application is made within 31 days from your termination date. The premium you pay depends on your age and the type of policy chosen. (You cannot, however, convert to a term type of policy). Application may be made to any agent of the Metropolitan Life Insurance Company or Prudential Insurance Company of America. (NOTE: You may be able to obtain a more appropriate policy, or better premium rate, through another company).

Vacation - You will receive pay in lieu of any unused vacation entitlement at the start of your salary continuance, unless you specifically request such payment at the end of continuance. (Vacation may not be used to extend salary continuance.) If your salary continuance period extends into the following year, you will not be entitled to additional vacation.

XEROX PROFIT SHARING & RETIREMENT INCOME GUARANTEE PLANS

Your Xerox Profit sharing consists of two parts - Savings and Retirement. You are always 100% vested in the Savings part. You are vested in the Retirement portion according to your length of service. You may also be vested in the Retirement Income Guarantee Plan. The vesting schedules are as follows:

VESTING SCHEDULE #1 (HIRED ON OR BEFORE 12/31/80)

Anniversary	Vesting in the Retirement Account
1st	0%
2nd	25%
3rd	50%
4th	75%
5th	100%

New employees joining Xerox after December 31, 1980 will start vesting in the Profit Sharing Retirement Account after completing five years of employment and will become fully vested after 10 years according to the following schedule.

VESTING SCHEDULE #2 (HIRED AFTER 12/31/80)

Anniversary	Vesting in the Retirement Account
Under 5 years	0%
5th	50%
6th	60%
7th	70%
8th	80%
9th	90%
10th	100%

All employees reaching age 65 are 100% vested under Schedule #1 and #2.

EXTENSION OF PROFIT SHARING PARTICIPATION

NOTE: This option is available only for those electing the salary continuance method (Receipt of a lump sum at any time during continuance always requires immediate payout of profit sharing benefits to terminating employes).

Extension of participation - Upon going on voluntary layoff status, your Employee Profile will be prepared to reflect a Profit Sharing Release Date of up to one (1) year from the end of your salary continuance. There are four reasons why it is advantageous to extend your participation in Profit Sharing and Retirement Income Guarantee Plans for up to a one year period. They are:

1. The Company's profit sharing distribution for the calendar year is available only to those who are participants at the end of the calendar year. (The distribution, of course, is based on earnings and salary continuance actually paid during the calendar year).

2. Participation through an extra anniversary date may improve an employee's vesting in either plan.

3. Participation through the 10th anniversary or 55th birthday may satisfy the requirements for Retiree Medical, Dental, Life Insurance and Survivor Income benefits.

4. Company service is credited through the last day of participation for purpose of determining your service should you be rehired.

You may, if you wish, waive this one year extension at any time and receive your money sooner by contacting your Personnel Representative and confirming the new date in writing.

If you wish, additional information regarding this option, you should call your Personnel representative.

Distribution - Non-Retirement - At the end of your participation, amounts due from the Profit Sharing Plans will be paid to you as a lump sum or annuity if you so choose. Contact your personnel office if you are interested in the purchase of an annuity. If you take a lump sum, you may roll it over into a tax sheltered Indidvidual Retirement Account (IRA) within sixty days of the distribution. You cannot "roll-over" employee contributions, therefore the payroll deductions to the Employee Savings Account must be excluded. IRAs can be purchased through banks, insurance companies and other financial institutions. Any amount withdrawn from the IRA prior to age 59 1/2 is subject to ordinary income tax and a 10% penalty tax.

Distribution - Retirement - If your participation ends after you have reached your 55th birthday and 10th service anniversary, retirement account funds are used to provide a guaranteed monthly retirement income. Consult your Personnel office for further information on retirement and income annuity options.

RETIREMENT INCOME GUARANTEE PLAN (RIGP)

If you have ten years of service at the time you cease participation in the Xerox Profit Sharing Plan you are vested in RIGP. A calculation of your minimum guaranteed retirement benefit will be made and any payments due will be made in the form of a lump sum for terminating employees or a increase in the retirement annuity purchased for retiring employees.

STOCK OPTIONS

Eligible employees continue participation in the Incentive Stock Plan and Executive Tandem Awards during salary continuance only. You have 90 days after termination to exercise vested Executive Tandem Award options. Selection of the Profit Sharing Extension Option will not continue participation in either plan.

TUITION AID

If you were attending classes prior to approval of voluntary layoff, you will be reimbursed for your tuition according to the Company's tuition policy even though the semester extends beyond the salary continuance period. Upon termination, you are no longer obligated to repay outstanding tuition aid advances. (NOTE: No tuition reimbursement will be made for classes beginning after approval of the voluntary layoff.)

STATUTORY BENEFITS

New York Unemployment Compensation

Since this program is strictly voluntary, in our opinion, participants would not be eligible for New York State unemployment compensation.

Social Security - Based on the experience of employees who have volunteered for reduction in force in the past, you may qualify for Social Security. If you are age 62 and otherwise qualify, you will be eligiible for rtirement benefits because you will not be receiving pay for work performed. Further, if you are age 62, and otherwise qualify, you will not be required to pay FICA taxes during salary continuance. In 1982 this tax is 6.7% on $32,400. For full details of Social Security benefits you would call the Social Security office at 263-6200 or the Geneva office at 315-789-1181.(FICA taxes will, however be deducted from vacation pay per federal law).

PRIORITY OF INFORMATION

In case there are inconsistencies or ambiguities relating to the terms and conditions of this VRIF, they shall be rsolved by reference to the following sources in this order: (1) Xerox Family Security Plans; (2) The 1989 VRIF Fact Sheet for employees; (3) Xerox personnel policies; (4) The employee handbooks "You and Xerox" and "Retirement at Xerox", and (5) Written communications from Xerox personnel and line management.

RETIREMENT ESTIMATES/PROJECTIONS

Employees considering a Voluntary Reduction in Force as a bridge to retirement may request an estimate of their projected monthly retirement benefit to assist in their decision making process. Please complete the attached form "Request for Retirement Estimate" to receive this projection and return it to Henry Mazur as soon as possible. This projection is for your use only and does not represent any commitment to participate in the VRIF Program.

REHIRE AS A TEMPORARY CONTRACT WORKER

Rehire as a Temporary Contract Worker is also prohibited until the end of the designated salary continuance period (or until an equivalent period of time has elapsed if a lump sum payment is chosen.)

INFORMATION MEETINGS

If you are interested in gaining additional information or clarification, Division Personnel will be conducting employee meetings. Employee spouses are also invited to attend one of these sessions.

November 8th	1:30 P.M.	105 Auditorium
November 10th	8:30 A.M.	205 Audiitorium

ADDITIONAL INFORMATION

All specific questions should be directed to your manager, your personnel representative, or the Manager of RMG Benefits.

I have read carefully and understand this "Fact Sheet" dated 11/82.

Robert C. Patterson
Employee Signature

Nov. 15, 1982
Date

This page of the "Fact Sheet for Employees" must be signed and returned with the employee's VRIF request.

If my request is approved, I plan on selecting the following salary payment option at my exit interview with my Personnel Manager.

1. Salary and Benefits continuance for 15 months. ✓
2. Lump sum total payment (in lieu of salary and benefits continuance.) ________
3. Salary and Benefits continuance for 30 months. ________

III

RMG

QUESTIONS/ANSWER INFORMATION

QUESTION: What differences are there between this Voluntary Reduction in Force program and an Involuntary RIF program?

ANSWER: The Voluntary RIF program being offered provides several incentives and options for employees. Major differences between the two programs are:

(a) Voluntary RIF participants will be allowed a salary lump sum settlement either immediately, or at any time they request payment. Under the Involuntary RIF program salary continuance will only be provided to the maximum of the salary payment schedule or until other employment is found, whichever occurs first. A follow up system is in place to track the employment status of those employees affected by an Involuntary RIF.

(b) Additional benefits for all employees with at least eight years service and age 51 1/2 or older are being offered to Voluntary RIF participants only. These benefits consist of three months additional salary continuance and the option of spreading salary continuance over 30 months at one half normal pay.

(c) Unemployment compensation will normally not be available to employees volunteering for RIF because this is a voluntary termination from the Company. Employees on Involuntary RIF status also would not be entitled to unemployment compensation while receiving salary continuance but could apply if no employment is found by the time salary continuance ends.

QUESTION: Will I be able to work beyond the 11/30/82 deadline for beginning VRIF Salary continuance?

ANSWER: No. Voluntary RIF participants will leave on or before November 30th. Exceptions to this deadline will only be made for critical business requirements and will require senior management approval.

QUESTION: Am I vulnerable to a potential future Involuntary Reduction in Force? Should I sign up for the Voluntary RIF program?

ANSWER: No final decisions can be made regarding which employees will be impacted by a potential Involuntary RIF in advance of knowing the number of Voluntary RIF participants. Guidelines for Involuntary selection have been developed and while preliminary lists may exist in some organizations, the results are definitely not final.

The number and types of VRIF acceptances, organizational needs, volume requirements and other circumstances will be evaluated in determining the need for any Involuntary RIF. While the Voluntary RIF is more attractive than the Involuntary RIF, employees must make their own decisions on whether or not to participate.

QUESTION: During my salary continuance, do I receive all Xerox Family Security Plan benefits?

ANSWER: With these exceptions, all other benefits would apply during salary continuance:

(a) Disability - you are not eligible for short or long term disabilitiy.

(b) Travel accident insurance - coverage ends when your salary continuance begins.

(c) Life Insurance - coverage does not increase if you reach your third anniversary during salary continuance and life insurance is reduced as follows:

- to 4 times your annual salary if you reach age 55 during the continuance period.
- to 1 1/4 times your annual salary if you have less than 3 years of service and reach age 65 during salary continuance.
- to 2 1/2 times your annual salary if you have 3 or more years of service and reach age 65 during salary continuance.

QUESTION: If I have questions on the VRIF Program, can I discuss these with someone else other than my manager?

ANSWER: Yes, employees should seek their Employee Relation/Personnel Manager to address specific questions they prefer not to ask their manager.

In addition, if clarification on the general content of the program is needed, informational sessions will be conducted on November 8 at 1:30 P. M. in the 105 auditorium and November 10 at 8:30 A. M in the 205 auditorium. Employee spouses are also invited to attend these information meetings.

To

From

Subject

Date

REQUEST FOR VOLUNTARY
REDUCTION IN FORCE

I am requesting that I be allowed to terminate my employment with Xerox Corporation under the terms of the Xerox Voluntary Reduction In Force Program. I understand that I will receive Voluntary Reduction In Force benefits according to the terms of the 11/82 Fact Sheet for Employees provided to me. I have read carefully and understand the Fact Sheet and agree to all its terms and conditions. It is understood that the Voluntary RIF effective date will be no later than November 30, 1982. I understand that in all cases, including my own, the decision to approve or reject this request is within the sole discretion of Xerox Corporation.

I further understand that, should this request be approved, I will not be eligible for re-employment by Xerox Corporation until a break in my Xerox service has occurred, defined by Xerox as two or more service anniversaries after release of my profit sharing funds. If this request is accepted, I release all claims I may have against Xerox except any claims I may have that Xerox failed to perform the terms and conditions of their VRIF Program.

Manager Approval

Robert C. Patterson
Employee Signature

Department Head Approval

Design Draftsman
Title

F.C.
Organization

Personnel Manager Approval

Robert C. Patterson
21 Antlers Drive
Rochester, N. Y. 14618

phone: (716) 442-1467

MY DEALINGS WITH THE EEOC

November 30, 1982

Forced by Xerox Corporation to take an early retirement offer.

June 22, 1983

Filed an Age Discrimination Charge against Xerox with the EEOC and the New York State Division of Human Rights in Buffalo, N. Y.

June 25, 1983

Received from the EEOC a copy of the letter they sent to Xerox on June 24, 1983. I understood that Xerox had ten days in which to respond to the charge.

August 22, 1983

Had received no word from the EEOC whatsoever. 60 days had elapsed since I filed the charge without the EEOC or Xerox making any attempt at reconciliation. As a result, I became a named plaintiff in the Lusardi et al vs. Xerox class action suit on October 6, 1983.

October 28, 1986

Sent a letter to James N. Finney, Associate General Counsel, EEOC, Washington, D.C. demanding answers to a series of questions.

December 9, 1986

Finney replied defending the lack of action by the EEOC.

December 12, 1986

I wrote again to Finney vigorously rebutting his arguments and posed further questions to which I demanded prompt answers.

January 6, 1987

Finney replied and in this letter he began "waffling" on some stands he had previously taken and appeared very much on the defensive.

Since January 6, 1987

No further word or action from the EEOC!

Xerox to cut 600 more

But worst is over for year, says firm

By John J. Byczkowski 11/9/82
Democrat and Chronicle Business

11/9/82

Xerox Corp. yesterday said it is cutting 600 more jobs, the largest cut in Monroe County since its job-reduction program began.

But the company — which has announced cuts of 2,175 salaried and hourly jobs so far this year — suggested that the worst is over, saying future cuts probably will not be as large as those this year.

Cuts announced yesterday will be made in the Reprographics Business Group, in Webster and Henrietta. Xerox said 150 salaried workers will be eliminated immediately and 450 hourly workers will be cut on Dec. 3. Of the 600, about 100 left voluntarily.

"There will be no further reduction of

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DEMOCRAT AND CHRONICLE, ROCHESTER, N.Y., TUESDAY, NOVEMBER 9, 1982 **3A**

Xerox to cut 600

FROM PAGE 1A

hourly people, and no substantial reduction for the rest of the year," said company spokesman John Rasor. "For 1983, our plans are incomplete. Some additional reductions are possible. However, we do not expect those reductions to be anywhere near what we had in 1982."

Xerox has been cutting its workforce to increase productivity. The company hopes the cuts will give it more of a competitive edge against other companies, particularly Japanese copier companies.

This year, 871 hourly jobs have been cut, as well as 1,304 salaried and 427 contract workers. Taking into consideration the latest cuts, Xerox now employs an estimated 12,800 in Monroe County, including 3,600 in manufacturing. This estimate excludes hiring and attrition which the company hasn't announced. In June, the last time Xerox released its workforce totals, it said it employed 14,394 here.

Xerox employment here has not been at the 13,000 level since 1971, Rasor said.

Cuts were not in a specific area or project, Rasor said. The salaried workers cut were mainly in engineering support, and their jobs ended yesterday, he said.

The company yesterday told the Amalgamated Clothing and Textile Workers Union, which represents 4,200 hourly workers at Xerox, of its plans, but it will be a week to 10 days before individuals will be notified that their jobs are cut.

Leslie H. Calder, manager of the Rochester Joint Board of the ACTWU, said the hourly workers will be cut according to seniority, with the last hired to be the first to go. Those with the least seniority have 2½ years experience at Xerox. The job cuts probably will reach to those who have worked at Xerox for five years, he said.

He added that the union will again ask Xerox to offer an early-retirement plan to prevent the layoff of younger workers. The company granted the union's last such request in September, and 99 hourly workers accepted early retirement.

The 100 workers who left the company voluntarily will receive salary continuance of 1-15 months, depending on length of service, but will not receive job-search assistance.

Salaried people leaving involuntarily will receive 1-12 months salary continuance, plus job-search assistance.

The hourly workers will receive company supplemental unemployment benefits based on length of service.

In the last seven quarters, Xerox has spent $104 million on the reduction-in-force program. Costs have included financial incentives to quit, early retirement and counseling.

Xerox has not cut as many hourly workers as salaried workers for two reasons, speculated Eugene Glazer, Xerox analyst for Dean Witter Reynolds Inc. First, there are fewer hourly than salaried workers; the hourly workers make up about 30 percent of Xerox's Monroe County employment.

Second, "Productivity gains on the manufacturing side have been fairly strong over the years," Glazer said. Manufacturing has been the more efficient side of Xerox, while management has been "the most cost inefficient."

Sanford Garrett, a Paine Webber Inc. analyst, said the efficiencies gained through the cuts will be reflected in manufacturing costs for the company's 10-series of copiers. Xerox has introduced the 1075 system, and Garrett said the company will introduce a "10-series" copier for every market segment.

Because of the series' design and productivity gains, the 10-series will cost 40 percent to 50 percent less to manufacture, while offering more features to customers.

Skills dated, he's back to school at 60

Draftsman hunts jobs for 5 years

By Michelle Levander [illegible]

Democrat and Chronicle

At the age of 11, Robert Patterson entered the world of work.

He found his first job — delivering milk on a horse-drawn cart in his hometown of North Tonawanda, Niagara County.

The year was 1938 — the Great Depression.

Patterson, a big-boned, husky boy, made $3 a week. Over the years, he learned to find jobs during scarce times.

Now 60, Patterson has to drum up a job once again. He's still learning to get by, but in a classroom these days.

Despite years of experience as a draftsman, he has discovered that computer technology has made his training almost obsolete. So he has taken courses in computer design.

Returning to school has become a familiar step for many of Rochester's dislocated workers, casualties of a changing local economy. In the past three years, more than 10,000 local workers were laid off. Among them were people like Patterson, whose training no longer served them well.

"I never had trouble finding a job from age 11 through age 50 in spite of numerous layoffs," Patterson said. "It wasn't until I had to look for a new job at age 55 that I discovered my skill and experience no longer counted for anything because of my age."

The son of a sea captain, Patterson started his first job early.

At 4:30 in the morning, he would hitch the horse to a milk cart and load the heavy wooden crates filled with glass bottles. Then he would make the rounds before school with the genial Mr. Wilke, whose generous belly was ample proof of his fondness for his own milk and cheeses.

Patterson later went to work as a coal passer and a fireman on steamers on the Great Lakes at age 17, bringing down iron ore for the war effort. Two years later, he joined the U.S. Marines and served in Guam, Japan and China. He has worked in places as far flung as Alaska and California as a construction worker, a dump truck driver and a laborer in foundries and hospitals.

By 1982, when he lost his job of 15 ½ years with Xerox Corp., Patterson was an experienced and meticulous draftsman. Yet on his job hunt, he found employers weren't interested in hiring an older man who had mastered neat hand lettering and fine drawings. Old-school draftsmen have been replaced by techno-fans who can design anything from tools to blueprints on a computer.

"I was asked that right at the start — 'What do you know about computer-aided drafting?' I had to say, 'Not a lot.'

"It's discouraging. You go to place after place after place. All those job stops all have my resume.

"I had a heck of a time. When I first started looking for jobs in 1982, I went to 150 to 200 places, with half drafting, half minimum-wage. And I didn't get one of them."

Patterson did a lot of cold-calling. He would go to an industrial area and hit every company with a resume.

"You get all dolled up. Put on a three-piece blazer and a tie and you are out for eight to 10 hours a day."

Discouraged, Patterson sometimes would stop for a half hour before walking to another door — to program himself for a question about computer drafting, and then a rejection.

Supervisors who hired Patterson for temporary drafting jobs said his skills are rarely in demand.

Computer-aided drafting is a plus "if you are looking at yourself as a complete [illegible]," said Thomas McQueen, a product designer at the [illegible] Co. Inc. "But with manufacturing [illegible] in a slump, even for him, those jobs are difficult."

[illegible], head of the drafting department at Rochester Instruments Systems and an old-school drafter himself, said he [illegible] workers like Patterson, who take pride in their handiwork.

But he also concedes that hand drafting is a dying craft.

"Computer designing is faster," he said. "It really frees up the operator to do creative thinking while the computer does all the drone-type work."

Patterson recently underwent complicated heart surgery. He also had a bleeding ulcer, brought on by worries about a job and his health.

But he began looking for work soon after his recovery.

He has just completed a course for dislocated workers at the Rochester Institute of Technology in computer-aided design and manufacturing.

"I think it's given an added dimension to the training he has, an extra string to his bow," said his wife, Marion.

Ironically, Patterson originally picked up the drafting pencil because he thought it would spell economic security. In the 1950s, the classified pages of the Buffalo newspaper had hundreds of job listings for draftsmen. As time went by, Patterson came to love the creativity of the trade.

In 1967, Patterson got a drafting job at Xerox and the couple came to Rochester. He and his wife soon moved into a two-story frame home on Antlers Drive, now filled with knickknacks, photos of his two children, an embroidered homily praising the world's bounty and fine china collected by his wife in the cupboard.

Julian H. Gonzalez Democrat and Chronicle

Robert Patterson now uses his drafting table only to do small jobs for friends. He finished a course in computer-aided design.

Democrat and Chronicle

A meticulous man, Robert Patterson has kept a record of every job.

But with cutbacks at Xerox, Patterson found himself out of a job in 1982.

Hundreds of laid-off employees from Eastman Kodak Co. and Xerox were hunting for jobs, and Patterson didn't have much luck. After a year of job-hunting, Patterson took a minimum-wage job as a nursing aide.

That began a series of what he calls "stoop jobs" in hardware stores, as a carpenter, a substitute teacher. His earnings plummeted from about $600 a week at Xerox to $140 a week from a part-time job or two and an additional ~~$180~~ a week $89 in retirement pay. In the last five years, he has worked only 16 months in his craft.

"The reason I could keep going is the fact I've been a hustler all my life, and I like money. And the only way you can make it is to earn it."

His wife, the household financial wizard, has the task of making ends meet.

"I shop all the specials, use all the coupons," she said. "You don't buy anything new. You don't go out to dinner. You don't go to movies, or if you do, you go to the matinees.

"Christmas — we have one, but we haven't done what we did in previous years."

When times are hard, Marion Patterson is fond of quoting an old saying: "Life may not be all you want, but it's all you have, so stick a feather in your hat and be happy."

And that's what the family plans to do.

His voice sometimes rises in frustration when he talks about his long job hunt. But he still hopes to re-enter the world of work soon.

He has his new haircut, sober blue suit and a resume in hand.

EEOC spared Xerox despite discrimination, Senate told

By JOHN MACHACEK
Gannett News Service

Earlier testimony, page 8D.

WASHINGTON — The U.S. Equal Employment Opportunity Commission refused to take action against Xerox Corp. even though the agency's staff concluded that the company violated age discrimination laws in laying off thousands of employees six years ago, a Senate panel was told today.

Jules Lusardi, a former Xerox employee, said the commission didn't show interest in the charges by laid-off older workers until he and more than 1,000 ex-Xerox workers filed a class-action lawsuit in federal court.

As the litigation proceeded, the commission staff concluded that Xerox had violated a federal law that prohibits employers from discriminat-

Please turn to back of section

EEOC spared Xerox, Senate panel told

From page 1A

ing against workers over 40, Lusardi told a Senate committee on aging.

"But EEOC suddenly and mysteriously decided not to take enforcement action against Xerox even in the face of a staff recommendation," Lusardi said. "Thousands of people are now wondering what EEOC is doing and for whom are they working."

Lusardi was the lead witness as the Senate Aging Committee opened a probe of the commission's record in enforcing the 20-year-old anti-age discrimination law. The law also bans involuntary retirement except at the senior management level.

"We are holding this hearing because we have learned through various sources that the law is not being enforced ... and because there have been a series of events and decisions ... (that) are counter productive to older Americans," said committee Chairman John Melcher, D-Mont.

Melcher said the committee already knows that the commission has fewer and less experienced people looking into age discrimination complaints.

"Some employers, either out of ignorance or perhaps greed ... are trampling on the rights of workers on the chance they won't get caught," said Sen. John Heinz, R-Pa.

Heinz said Congress needs to "send a clear message to employers that to discriminate on the basis of age is as repugnant to the law as to discriminate on basis of sex, religion and color."

Lusardi was 41 when he was fired by Xerox despite a successful 15 years as a salesman in the New York City area. He and 7,000 other Xerox workers were laid off or elected to take early retirement as part of the company's workforce reduction. Xerox said the cuts were necessary to meet competition from Japanese rivals.

But when Lusardi and others discovered Xerox was advertising for their jobs and filling them with younger people, they filed a complaint with the EEOC. When the commission did nothing initially, the Lusardi group filed a lawsuit in U.S. District Court in New Jersey, Lusardi's home state. That suit is pending.

"When it seemed we were getting somewhere, the commission staff came out with a letter saying it had evidence the company had engaged in age discrimination," Lusardi said. In an interview after the Senate hearing, Lusardi said Xerox is now trying to decertify the class acion suit involving more than 1,300 former Xerox workers so that each claimant will have to sue the company as an individual.

Although he's now employed again as a sales product manager, Lusardi told the committee he still remembers the pain and loss of self esteem after he was fired.

Committee members praised Lusardi for his efforts in pursuing the complaints against Xerox. "It would appear that simply because you were 41 you were part of a reduction in the work force," Melzer said.

Late Edition Front Page Times-Union

Rochester, N. Y.

Thursday, September 10, 1987

Vincent A. Cirillo
45 Ferguson Avenue
Broomall, PA 19008

May 17, 1988

Senator Metzenbaum
Chairman, Senate Subcommittee on Labor
608 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Metzenbaum:

A serious illness within my household makes it virtually impossible for me to attend the upcoming hearing. Nevertheless the shocking and traumatic experience of being fired after 43 years (minus 4 months) of excellent company service with Atlantic Richfield/Arco Chemical Company necessitates this letter to make the Subcommittee aware of my story.

Although my own unique series of grievances start in 1978/1979 at 62 years of age, I will confine the contents of this letter primarily to the 1986 forced termination of employment.

First, my training has been in the areas of Science and Mathematics. No business training, no physical education training, no legal training, etc. Business matters and legal affairs are and always have been at best only of casual interest to me. I am a highly educated person and consider myself fairly intelligent. My job title at Arco Chemical was Manager, Analytical Chemistry Operations.

On August 13, 1986, my Supervisor, in the presence of an Employee Relations representative, told me there was no longer a place for me in the Organization. He said I would get severance pay to October 17, 1986. My retirement pay should start November 1, 1986. Just like that, after 43 years of company service. I was told that meetings would be scheduled by Employee Relations personnel to discuss various company benefits and options from which we were permitted to choose. Upon receiving notice that I was fired (I think the suddeness of it put me in a state of shock) I applied for an extension to my termination. It was denied. Interestingly, of the people that I knew who were in various stages of shock after having been fired, the preponderance of them were over the age of 50. Interesting.

When I was fired I was earning $1,267.36 per week ($65,909.72 year). At the meetings we were instructed to fill out forms concerning the selection of co-owners, beneficiaries, etc. to the various options. In addition, there were two Retirement Plans from which we were to select one. The Retirement Plan I chose was entitled: Enhanced Retirement Program Special Payment Documentation, Acknowledgement and Payment Schedule. I was given this document on September 26, 1986. As I found out later, I selected the Plan that paid about $9,000.00 less than the other Plan I could have selected. I believe this oversight on my part was also due to shock, trauma, and confusion.

Now, the reason I waited until the last week (I signed on October 24, 1986) before signing the document is as follows: As I stated previously, my grievance with Arco is unique in a number of ways. I will discuss at this point the one apropos to what everyone refers to as the "Release". On Thursday, July 10, 1986, on page 49 there appeared an article in the Wall Street Journal with a column headline that stated "U.S. Says DuPont Early Retirement Plan Was Flawed". The article went on to say that DuPont discriminated against employees older than 65 and those with more than 35 years of service with the company, "a federal agency ruled". My uniqueness is that I was the only full time employee at Arco Chemical older than 65 and I also had more than 35 years of company service. Consequently during the termination proceedings I asked to see how my retirement dollar amounts were determined (calculated) in view of the DuPont flaw. I wondered whether Arco may also have flawed. From September

26, 1986, the date I was given the document entitled, Enhanced Retirement Program Special Payment Documentation, Acknowledgement and Payment Schedule I requested this information (dollar amounts determination) several times but the information was not forthcoming. The lower half of the document had a General Release portion which I was told had to be signed by me before November 1, 1986, or I would not get any part of the pension package. In other words, "if you don't sign before November 1, 1986, you get no money". The thing that really galled me was that I could not even get my own voluntary contributions to the pension fund unless I signed the document by November 1, 1986. Please remember, after October 17, 1986, I would receive no more pay, no income. Since I was running out of time (November 1, 1986, was fast approaching), and facing the trauma of no pay, I signed the "Release" on October 24, 1986. Only then would I get the pension money due me. I still do not know for certain whether Arco flawed "a la DuPont".

Incidentally, the Employee Relations gentlemen with whom I dealt during the termination proceedings confirmed the November 1 deadline for signing in his Deposition.

I never thought I was giving up all my rights (if indeed I had any) by signing a document that does not even have the word "Release" in the title of the document. I merely signed the document as a receipt for the Special Payment under the Plan I selected and I was delaying the signing to see how my pension dollar amounts were calculated. That is the sum and substance of my signature on the document entitled Enhanced Retirement Program Special Payment Documentation, Acknowledgement and Payment Schedule.

Other Information of Interest

The Arco attorney with whom I met on one of several occasions pointed out that I should have followed Employee Problem Resolution procedures without fear of reprisal. First of all, I did follow the procedures by going as high as the Vice President-in-charge-of-Research with my complaints. This got me nowhere.

For me, to continue to follow company procedures for settling grievances would only continue to be lessons in futility and frustration of which I already had my fill. Examples are:

1) In 1978, at age 61 3/4 I was made a "second class citizen" by my Supervisor.

2) In 1982, at age 65 I was fired as a result of false accusations. I was fired without warning and without a hearing. I had 39 years of excellent company service at this time. Strangely enough, I was deemed guilty and I had to prove my innocence-I do not think that is the American way, is it?

3) After I proved the accusations false I was reinstated.

4) In 1985, after I refused Arco's voluntary retirement program (which was in fact strictly voluntary-there was no coercion to force anyone to retire) I was threatened with a 3 grade job cut by the Manger of Employee Relations and the Vice President in charge of Research. My immediate supervisor told me this was being done because "I was too old, I should have retired".

5) In 1986, I am fired-no place for me in the Organization.

QUESTION:

In view of the above, how anyone could expect me to continue to voice my complaints without fear of retaliation is beyond my comprehension.

This letter Senator Metzenbaum is the part of my story in which the Subcommittee may be interested. Thank you.

Sincerely,

Vincent A. Cirillo

VINCENT A. CIRILLO

VAC/
cc: Paul D. Nelson, Esquire

Senator METZENBAUM. We will now hear from the next witness, Mr. Richard Komer, Legal Counsel for the EEOC, Washington, DC.

Mr. Komer, we look forward to hearing from you, and frankly, as has been indicated, we are truly concerned about the activities of the EEOC.

It is my understanding that you are appearing here today because members of the Commission itself were going to be out of the city, and indicated a willingness to change their plans if necessary, but said they would like to send you. On that basis, we are happy to welcome you, sir, but we will start off by telling you that this Committee has been unhappy about the actions of one of our governmental agencies.

STATEMENT OF RICHARD KOMER, LEGAL COUNSEL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WASHINGTON, DC

Mr. KOMER. Thank you, sir.

Good morning, Chairman Metzenbaum and Senator Stafford. I am pleased to represent the Equal Employment Opportunity Commission today to testify on waivers under the Age Discrimination in Employment Act. Chairman Thomas sends his regrets that he is unable to be here to testify. By the time the subcommittee notified him of the hearing date and asked him to appear, he had already made an out-of-town commitment for this morning; otherwise he would be here today.

Senator METZENBAUM. May I just ask, regarding Mr. Thomas' out-of-town commitment, is that a commitment involved with some enforcement action, is it just a speech, or what?

Mr. KOMER. I honestly don't know, having been out-of-town myself for the past month.

Senator METZENBAUM. Oh, fine. You may proceed.

Mr. KOMER. Just a word about why me. I am the legal counsel at the EEOC. One of our functions is to prepare regulations at the direction of the Commissioners. Therefore it was my office which prepared the final regulation on waivers which you have suspended recently.

Rather than simply reading the testimony, I'd just like to hit a few high points and clarify a couple of questions if I could.

The Commission's objective in initiating the waiver rulemaking was twofold: to ensure that older workers are not precluded from exercising their rights under the ADEA by arbitrary, unnecessary bureaucratic barriers, and to provide certain clear legal standards for allowing releases and ensuring that they are knowing and voluntary.

I think a number of the issues that we grappled with in the rulemaking have been highlighted today. Several of those have been the subject of Commission litigation both before and after this rulemaking was commenced and finished. In one particular case, we have ourselves gone into the Fifth Circuit in order to ensure and vindicate the ability of employees and former employees to come to the Commission despite having signed a waiver and file a charge with us. As you may recall in Mr. Marans' testimony, one of the most offensive things about the waiver that he was asked to sign was that he could not come to the Commission—in fact, his coming to the Commission would have violated the release that he had signed and he would have been in breach of that release.

It has been the Commission's position, and we incorporated this very clearly into the final rule—at least, I thought we had—that you cannot waive your right to come to the Commission after you have signed a release; that is one of the things which it is against public policy to do.

We had incorporated what we thought were a number of other protections into the final rule that I think are critical in some of the other cases which were alluded to. For example, Senator Melcher made reference to a Mr. Hallas' case against an employer in the Pittsburgh area. I'd like it to be understood that we have twice sued that employer in the Pittsburgh area because of the way they have gone about using waivers. We have won in both of those cases. Each involved a slightly different waiver. And if I recall correctly, the basic problem there was that people who were being terminated were being told that they would lose rights or benefits they were already entitled to if they did not sign waivers.

We made clear in the final rule that a waiver is invalid, or a release is invalid, if it is not for additional benefits such as those that I believe Mr. Graham received. In other words, just because you are firing someone, and you have them to some extent over a barrel, you are not allowed to coerce a release from them in exchange for giving them what they are already entitled to. That was another of the protections which we had built into the rule.

We made a couple of other additions——

Senator METZENBAUM. I have a question, Mr. Komer, before you finish.

Mr. KOMER. Certainly.

Senator METZENBAUM. As I understand it, if you file a charge with the EEOC, that individual loses his or her right to sue, has to give up that right to sue; is that true?

Mr. KOMER. If you file a charge with us?

Senator METZENBAUM. Under the EEOC waiver rule, an older worker may still bring a charge—but has he waived his right to sue?

Mr. KOMER. Only temporarily—he is required under our statute to come to us and file the charge with us for 60 days prior to initiating a lawsuit. However, he can initiate the lawsuit at the termination of 60 days.

Senator METZENBAUM. All right. Now, Mr. Marans has filed a charge with you; the case has been pending for a number of months; he has been advised by some investigator that the case isn't going anywhere; he can't go into court and bring an action——

Mr. KOMER. Yes, he can. That's the point. He can go into court. He is not precluded from going into court by anything in the statute that I am aware of.

Senator METZENBAUM. He can, because he didn't sign the waiver.

Mr. KOMER. That's correct. He did not sign the waiver.

Senator METZENBAUM. But if he had signed the EEOC waiver, he would not have been in a position to go into court and sue on his own, would he?

Mr. **Komer**. Excuse me. You can go into court, but what is likely to happen is what has happened to Mr. Terrell, which is you sign the waiver, and you go into court, and the first thing that the company will assert as a defense will be the fact that you have waived the right to recover from your termination with that company. You can sue, and your defense to the defense, if you will, is to assert that in fact you did not sign the waiver in a knowing and voluntary fashion; in other words, you can avoid the waiver that you have signed, or the release that you have signed, if you can show that in fact it was coerced.

Similarly, when you come to the Commission with the waiver and assert that you were coerced into signing that release, if we find that in fact you were, or we would have under the rule——

Senator **Metzenbaum**. What does it mean to be coerced, in your terms?

Mr. **Komer**. In our terms? I believe we discuss some of that in the preamble to the regulation. Essentially, it comes down that you made a knowing and voluntary release of your rights under the ADEA.

Senator **Metzenbaum**. I don't understand that, and I'm a pretty good lawyer. What are you saying? If an employer comes to you as they came to these men and says, "You've got to sign the waiver, or else you either lose part of your pension benefits, or part of your severance pay," is that coercion?

Mr. **Komer**. We would call it coercion if the employer is saying you are going to lose part of your pension benefits which are vested and accrued at that point. We have said that is coercion. What we have said is not necessarily coercion is if your employer comes to you and says, "You are being terminated, but in order to avoid litigation, we have a practice of offering you additional benefits at your termination in exchange for your releasing potential claims against this company." That is what happens in the ADEA, and we have modelled that on the standards which are presently applicable in Title VII cases—those are the race, national origin, and religion cases.

Senator **Metzenbaum**. I am having difficulty in finding the conclusion of each of your sentences. I ask you a question, and you give me a speech. Now, I know you are not trying to do that, but I am trying to find out if Mr. Marans files a lawsuit, do you drop his case?

Mr. **Komer**. If Mr. Marans files a lawsuit, we might well intervene. I think that would be one of our options. But I don't know that we have made any conclusive decision on whether or not to litigate his claim.

Senator **Metzenbaum**. If an employer says to an employee, "We'll increase your pension benefits or your retirement pay if you sign this waiver," is that coercion—yes or no?

Mr. **Komer**. If that's all that is happening, I would probably say no, it is not.

Senator **Metzenbaum**. What else has to happen?

Mr. **Komer**. For coercion to occur?

Senator **Metzenbaum**. Yes.

Mr. KOMER. Well, first, as I said, they have to be trying to take something away from you in exchange for nothing, because they have you over a barrel.

Senator METZENBAUM. If they offer you something additional, then it is not coercion?

Mr. KOMER. At that point, it is difficult to say it is involuntary if you are making a good faith exchange for something additional. It may not be knowing, but it is probably not involuntary.

Senator METZENBAUM. Under your rule, isn't it a fact that employees will litigate for years on waiver issues and not on the underlying issues of age discrimination? You have shifted the focus to the issue of waivers rather than to the issue of age discrimination, which is your responsibility.

I think many of us in Congress, certainly when Congress unanimously indicated their concern about the waiver issue, sent you a signal. I don't understand why an agency charged with the responsibility of attaining a certain objective—and that is to see that employers don't discriminate based on age—then has to divert the thrust of that by coming up with this rule on waivers.

Mr. KOMER. Senator, I think on this, it is not very dissimilar from what you were discussing in your opening statement, which was that in many cases during so-called voluntary reduction in force programs, companies don't even request waivers or releases. However, in those situations, people do in fact challenge their employers, and the issue becomes a threshold issue very similar to that involving releases, which is: Was your termination involuntary, or did you in fact voluntarily retire in exchange for the additional benefits.

It is true that this is a threshold sort of issue, but the purpose of releases in many cases, I believe, as is the purpose in a voluntary retirement incentive program, is to avoid extended litigation by virtue of making someone a deal. That is what happens in lawsuits all the time, and in fact, it is what happens under title VII where, in exchange for a bargain, you agree to drop a lawsuit. It happens in tort cases, the most egregious of terrible personal situations—people will settle those for a payment to avert the perils of litigation.

Senator METZENBAUM. Yes, but there is a major distinction, Mr. Komer. In those cases, the individual is represented by counsel, the individual is able to be apprised of his legal rights or her legal rights, but here you are talking about waivers without any supervision, without anybody standing up to protect the rights of the individuals.

Mr. KOMER. Excuse me——

Senator METZENBAUM. Let me ask you a question. The EEOC regularly compares waiver policy under the ADEA to settlement of title VII claims. But title VII settlements involve actual legal disputes where one or more persons typically have filed a charge or complaint against an employer alleging discrimination.

By contrast, the EEOC's waiver rule applies to situations where there is no legal dispute. I am referring here to the early retirement, or exit incentive programs, where hundreds or thousands of older workers are offered benefits as part of a voluntary reduction in force, but they have no reason to allege or even contemplate a discrimination charge at the time a waiver is presented to them.

Is the title VII situation really comparable to the situation under these exit incentive programs?

Mr. **Komer**. I think it is, Senator, or we probably wouldn't be here. The title VII cases that are reported generally involve asserted actual filed claims which people have settled. The fact that that is the case doesn't mean that in fact, title VII would not permit a release in exactly the situations that we have been talking about under the ADEA. In fact, it would; many of these releases are not limited to your ADEA rights; they are generally inclusive of your title VII rights as well. And the courts which have been deciding these cases under the ADEA are sometimes also deciding them under title VII. There was a recent district court case in Texas essentially to that effect.

Senator **Metzenbaum**. [Conferring with staff.] There is a distinction, staff points out to me, because the ADEA itself says specifically you can't waive your rights except when there is supervision. We don't have that under title VII.

Mr. **Komer**. Senator, if I accepted the premise, you would be absolutely right. But the premise, I think, is erroneous. When we started this process, it is true that there was virtually no case law on this topic, with one exception, and that was a Sixth Circuit panel decision saying that you could not waive your rights under the ADEA.

There was a lot of water under the bridge by the time we issued the final rule, there were four, and now there are five, circuit courts of appeals decisions saying that in fact you may release your rights under the ADEA if it is a knowing and voluntary release. The first case to hold that was the Sixth Circuit *en banc*, where all 13 judges sat and overruled the panel that said that you could not release your claims under the ADEA. They wrote a fairly lengthy decision addressing whether or not the Fair Labor Standards Act as incorporated into the ADEA would prohibit a waiver or a release of your ADEA rights. And that *en banc* decision, 11 to 2, held that in fact you could release your rights under the ADEA. Four subsequent circuit court cases have taken the same position.

We are in a situation at this point where no circuit court of appeals under the ADEA has said "No, you may not release your rights." What we've got, in other words, is a situation where it is 5 to 0 in the circuits, and at this point we don't see substantial likelihood that the circuit courts are going to develop a conflict.

Now, there is one possible exception, which is the Eleventh Circuit, which had in an FLSA case, not an ADEA case, taken a fairly straightforward view that there could be no waivers of factual disputes under the FLSA, and that's why in issuing the final regulation, in order to achieve nationwide consistency, we used our exemption authority with respect to establishing the principle in that circuit as well.

Senator **Metzenbaum**. Mr. Komer, isn't it the fact that in each of those court of appeals cases which favored the EEOC, they all did so on the basis of deferring to the EEOC rule, and——

Mr. **Komer**. No, sir, that's not a fact.

Senator **Metzenbaum** [continuing]. Just a moment; let me just finish, Mr. Komer.

Mr. **Komer**. Excuse me.

Senator **Metzenbaum**. What they were really saying is that we are bootstrapping, that we are ruling this way because of your rule. But the Supreme Court cases in this area clearly go the other way. In the case of *Lorillard* v. *Pons,* the Supreme Court held that the enforcement procedures of the ADEA follow the Fair Labor Standards Act and not title VII. The Court specifically stated as follows: "The selectivity that Congress exhibited in incorporating provisions and in modifying certain practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA." That's the end of the quote.

Now, how can EEOC assert here that the FLSA's waiver procedures should not apply, and aren't you simply ignoring the statutory language as applied by the Supreme Court?

Mr. **Komer**. No, I don't think we are ignoring the statutory language as applied by the Supreme Court. The courts of appeals, even more so than the administrative agencies, read the Supreme Court cases. They understand the Supreme Court cases. They have not had substantial interpretational difficulties with *Lorillard* v. *Pons* or any of the FLSA cases.

Again I refer you to the *en banc* decision in *Runyan,* where they went through the analysis of the FLSA and its relationship to the ADEA in a great deal of detail, and only at the very end of that decision did they make reference to our notice of proposed rulemaking. That court knew that our notice of proposed rulemaking was not a legally effective rule, since it was only a proposed rule. They had to decide that case on the basis of the law as they saw it and as they saw it they found that the ADEA did permit releases, and in fact, that the FLSA is not crystal clear on waiver of factual disputes like ADEA claims.

Senator **Metzenbaum**. Are you totally disregarding the Supreme Court decision in *Lorillard* v. *Pons*?

Mr. **Komer**. No, sir, we are not. *Lorillard* v. *Pons* is a decision that we use all the time. The point is that there are substantive and procedural components of the ADEA, some of which follow title VII, some of which follow the FLSA, and all of which have to be informed by the purposes of the statute. And one of the purpose of the statute, the ADEA, was to permit employers and employees to address the issues involving the effect of age on employment.

Senator **Metzenbaum**. In your testimony, you state: "It is conceivable that if every waiver had to be supervised by EEOC, employers simply would downsize without offering additional benefits."

I might point out to you I have referred to a whole group of corporations that have had early retirement plans and have not asked their employees for waivers, and they seem to do very well, both economically and in handling these problems.

Do you have any evidence to support your assertion, because based on published reports of downsizing, we found that more than 75 percent of the companies we contacted downsize without seeking waivers.

Isn't it likely that if only supervised waivers were permitted, more employers would decide to downsize by offering benefits without seeking waivers?

Mr. KOMER. I have no way of answering that question, Senator. I think that what will happen is that some companies will take the money that they were offering in exchange for waivers and simply give it to their attorneys to defend cases involving involuntary removals. Other companies will drop the request for a waiver and continue to attempt to do it utterly without a release, and some of those companies, like the ones you have asked, will probably find themselves being sued.

I don't know if your survey did ask, but some of those companies may be companies which engaged in these voluntary retirement programs fairly early on when they were confident that employees would not——

Senator METZENBAUM. 1985 to 1987 can hardly be considered "early on".

Mr. KOMER. But did you ask those companies how many of them had been sued by the employees who took the voluntary retirement packages?

Senator METZENBAUM. [Conferring with staff.] I am advised by staff that we did make that inquiry, and that there were a few lawsuits, not many—you are talking about thousands of employees—and the employers actually shrugged off that contention.

Mr. KOMER. Some of these may still be in our process rather than the courts, but we have had a couple——

Senator METZENBAUM. Talking about "your process"—what are you going to do about the charge made by Mr. Marans that one of your staff people indicated that his case wasn't going anywhere? Are you going to go back and check into it and see why it's not going anywhere?

Mr. KOMER. That is really not my bailiwick, but I'm sure that after this hearing, someone will.

Senator METZENBAUM. This Committee wants an answer.

Mr. KOMER. His case, though, I think——

Senator METZENBAUM. Just a moment. I want you to understand what I'm saying. I want an answer, if the Marans case isn't going anywhere, why it isn't going anywhere. Now, I understand that there are procedures, and you can come to a conclusion that there is no basis. There is a prima facie case made by this man, certainly, that there was discrimination. They tried to get him to sign the waiver; he didn't. I want to know why it's not going anywhere if it isn't going anywhere.

Mr. KOMER. We would be happy to provide that information, Senator, but I think one consideration on our part will be that his case essentially involves an unsupervised waiver issue. Your appropriations rider, which tells us that we may not expend funds to pursue any policy or practice pertaining to unsupervised waivers until the Congress acts, puts us in a pickle with respect to cases involving unsupervised waivers, because the appropriations rider does not say that we may not have any policy permitting unsupervised waivers or prohibiting unsupervised waivers. It says we may not implement any policy pertaining to unsupervised waivers—pertaining to.

Senator METZENBAUM. You may not do what?

Mr. KOMER. We may not spend money to implement any policy pertaining to unsupervised waivers.

Senator METZENBAUM. We have here in the Conference Report:

> The Conferees intend to preclude reliance upon the regulation and underlying EEOC policy during fiscal year 1988. The Conference Agreement also precludes the EEOC from otherwise recognizing unsupervised waivers of ADEA rights as valid, for example, by filing court briefs or by ceasing investigation of claims due to the existence of an unsupervised waiver. The conferees do not intend for this temporary suspension to affect the standing or rights of parties to sue for rescission of the regulation should the regulation become effective at some later date.

I don't read that as you interpret it.

Mr. KOMER. Senator, we aren't at the stage of an investigation, which it is clear that under the Conference Report we are supposed to complete. As I understand it from what he was saying, we have completed our investigation. We have not applied the rule in terms of evaluating his case. But when it comes to the point of your asking us whether we are going to litigate this case involving an issue that clearly pertains to an unsupervised waiver——

Senator METZENBAUM. He signed no unsupervised waiver. He signed no waiver at all. Why can't you go forward? He signed no waiver—because they offered him a waiver and it was unsupervised, does that preclude your acting?

Mr. KOMER. I believe that the way the case came to us was that the offering of the waiver was what constituted the violation. But as to whether there was a discriminatory act in his termination itself, that I think we can proceed with despite the appropriations rider.

Senator METZENBAUM. You have had the case for 9 months. No employee should be subjected to that kind of treatment from his Government. I want an answer to why the case isn't moving forward. You have not given me an adequate answer. You talk about unsupervised waivers, but the man didn't sign anything. So how can you talk about something that the company offered him, and that's going to preclude his right to have his Government agency protect him; is that what you are saying?

Mr. KOMER. Senator, I will get you an answer on this question, but I don't know the answer at this time.

Senator METZENBAUM. Mr. Komer, you have heard three older workers describe their wrenching experiences with unsupervised waivers. Don't you think that a rule encouraging unsupervised waivers is going to result in thousands more stories like the three that were told this morning?

Mr. KOMER. No, I don't. I don't think that permitting unsupervised waivers is going to encourage further situations such as we heard today. I think our rule, because of the limitations that we have built into it, which have never been expressed before except through cases, will in fact provide significant protections to the individuals. A lot of the more egregious things that you have heard today, I think would represent violations of our rule, and we would be able to proceed with those cases.

The assumption seems to be that either all releases are valid, or no releases are valid. In fact what our rule says is that some releases can be valid, and this is the way you go about doing it; these are the steps you have to go through. You have to encourage people to consult with an attorney; you have to give them adequate time; they have to have a knowing and voluntary release of those claims; it has to be in writing; it has to be understandable; it has to clearly apply to the ADEA.

I think that those things will eliminate a lot of the more egregious waivers and releases that we have been seeing. And in fact, as I tried to explain, we pursued a number of those.

Senator METZENBAUM. Mr. Komer, I appreciate your testimony, but sometimes I get the feeling that witnesses come before this Committee to try to tell us why they aren't doing the job rather than explaining to us how aggressively they are attempting to enforce the law that Congress has written. And I get the feeling that you spend more of your time trying to figure out why the EEOC shouldn't be doing something than why the EEOC should be doing something. The thrust of the law is clear, and the EEOC response is disturbing. It is very disturbing when I feel that terminated employees come before the EEOC these days and wonder whose side you are on. And some of the testimony this morning, your own testimony, frankly is very disappointing, because you don't make the policy for the EEOC, but as I see it, the policies that have been made are not very helpful to senior citizens who have lost their jobs and who feel that they have been discriminated against.

But I thank you for your testimony and look forward to hearing from you in connection with the Marans case.

Mr. KOMER. Thank you.

[The prepared statement of Mr. Komer with an attachment follows:]

TESTIMONY OF
RICHARD D. KOMER, LEGAL COUNSEL
U. S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BEFORE THE SUBCOMMITTEE ON LABOR
COMMITTEE ON LABOR AND HUMAN RESOURCES
U. S. SENATE
MAY 24, 1988

Good morning, Chairman Metzenbaum and members of the subcommittee. Thank you for inviting the Equal Employment Opportunity Commission to testify on waivers of rights under the Age Discrimination in Employment Act.

On July 30, 1987, the Commission voted unanimously to adopt a regulation which established guidelines for employees to sign waivers and releases of private rights under the ADEA without mandatory EEOC supervision. The new rule became effective Sept. 28, but was later suspended for fiscal year 1988 by a Senate amendment to EEOC's appropriation.

The Commission's objective in initiating the waiver rulemaking was two-fold: to ensure that older workers are not precluded from exercising their rights under ADEA by arbitrary, unnecessary bureaucratic barriers, and to provide certain, clear legal standards for allowing releases and ensuring they are knowing and voluntary.

The rule sought to create a consistent uniform approach to the voluntary settlement of ADEA claims when settlement is in the mutual interest of the employee and employer. If the rule had not been suspended by Congress, ADEA waivers would have been subjected to the same standards and procedures as waivers under Title VII of the Civil Rights Act of 1964. Particular criteria for ensuring that any waiver of ADEA rights was entered into knowingly and voluntarily, without fraud or duress, were clearly spelled out in the rule. It also prohibited the release of prospective claims.

There seems to be a widespread misconception that EEOC was routinely supervising waivers and that our regulation permitted us to cease providing such supervision. This is not the case. EEOC never has had a general process or procedure for supervising and approving each and every private waiver of ADEA rights when no charge of discrimination has been filed. To require EEOC to supervise waivers without additional resources would overwhelm the crucial enforcement program we have embarked upon under ADEA, Title VII, EPA, the Rehabilitation Act and federal sector programs. Such an additional burden upon the staff would lengthen the time it takes to investigate charges and it is questionable whether an appropriate procedure could be implemented without subjecting employees and employers to significant and inappropriate delays. Private ADEA settlements generally have been entered into without government oversight. The same always has been true of settlements of other types of employment discrimination claims under Title VII.

The Commission initiated this rulemaking in response to an interpretation of the ADEA by a panel of the Sixth Circuit Court of Appeals in Runyan v. NCR. The court held that certain private waivers were invalid because they had not been supervised by EEOC. Section 7(b) of the ADEA incorporates the enforcement procedures of the Fair Labor Standards Act into the ADEA, and relying upon case law under FLSA, which prohibits contractual release of FLSA rights (liquidated damages or coverage of FLSA) without government supervision, the court ruled that ADEA rights could not be waived by a private unsupervised release.

In the wake of uncertainty following the initial Runyan decision, the Commission determined its rulemaking authority under ADEA was a particularly appropriate mechanism to resolve the issue. A law enforcement agency can be effective and credible only if its actions are consistent and predictable, and a well-crafted rule, had it been left in place, would have provided the clear guidance necessary to enhance EEOC's effectiveness. The rulemaking process was carried out in an open manner, with notices published in the Federal Register and ample opportunity over a two year period for all interested parties to comment.

Prior to the Commission's adoption of a final rule, the Sixth Circuit Court of Appeals, sitting en banc, reversed the panel decision in Runyan and held the ADEA waiver in that case was valid despite the absence of government supervision. In reaching its decision, the court specifically addressed the question of FLSA procedures, finding them not to be a bar to waiving factual issues. Four other federal circuits have recently held that unsupervised waivers are valid under ADEA if they are knowing and voluntary. The decisions are:

Valenti v. International Mill Service (3rd Circuit -- vacated, rehearing en banc pending)
Moore v. McGraw Edison (8th Circuit)
Lancaster v. Buerkle Buick (8th Circuit)
EEOC v. Cosmair, Inc. (5th Circuit)
Dorosiewicz v. Kayser-Roth Hosiery (4th Circuit, unpublished)
Sullivan v. Boron Oil (3rd Circuit).

EEOC v. Cosmair, Inc. was particularly important to the Commission because it is the first decision to vindicate our position that a **private** waiver cannot affect EEOC's ability to protect the **public** interest in eliminating age discrimination.

The Fifth Circuit upheld the Commission's position that a waiver cannot prevent an employee from filing an age discrimination charge with EEOC, whether to alert EEOC to a pattern and practice of age discrimination or to challenge the waiver as not knowing and voluntary. The court adopted EEOC's position and held that employees are protected from retaliation if they seek to challenge an executed waiver. The Commission's final rule incorporated this very important principle in the hope that it would forestall litigation that would impede enforcement of the ADEA.

In adopting the waiver rule, the Commission relied on Congress' declaration in section 2(b) of the ADEA that one of its purposes was to encourage employers and employees to "find ways of meeting problems arising from the impact of age on employment." The legislative history of ADEA, as well as subsequent court decisions, emphasized the importance to older workers of voluntary settlements under ADEA and expeditious resolutions of disputes.

It has been suggested that this rule is "pro-employer." Nothing could be further from the truth. EEOC seeks to see that justice is done for both employees and employers. It is conceivable that if every waiver had to be supervised by EEOC, employers simply would downsize through layoffs and reductions in force without offering such additional benefits. The vast majority of American workers who sign waiver agreements in exchange for additional benefits do not want the fruits of their bargain delayed or jeopardized by EEOC, should the agency be required to supervise each and every agreement.

EEOC's rule included safeguards for those signing waivers. First, the rule would not have affected the rights of victims of age discrimination who did not wish to settle their claims. Second, nothing in the rule prevented an employee from asking EEOC to supervise the waiver. Third, the rule made it clear that the right to file a charge or participate in an EEOC investigation was absolutely protected and that private waivers and releases would not have affected the EEOC's rights and responsibilities to enforce the ADEA. Fourth, prospective claims could not have been waived under the rule. And finally, in response to public comments received during the rulemaking process, the rule defined a knowing and voluntary waiver:

- The waiver must be in writing, in understandable language, and clearly waives the employees' rights or claims under the ADEA.
- A reasonable period of time is provided for employee deliberation.
- The employee is encouraged to consult an attorney.

An issue that raised considerable concern during the public comment period was whether the rule would sanction releases of prospective claims. While it never was the Commission's intent to allow such prospective releases, language barring such releases was not contained in the notice of proposed rulemaking. To avoid this misunderstanding, the final rule enunciated this principle and gave the rule greater certainty and clarity.

Several commenters asked that the last sentence of the notice of proposed rulemaking be deleted or revised to say that the Commission would not seek relief for individuals who have released their ADEA rights. The proposed rule stated "No such waivers or releases, however, shall affect the Commission's rights and responsibilities to enforce the Act," and the Commission retained this language in the final rule.

The rule was intended to give older workers freedom to act in their own self interest without government interference, but it also preserved the government's freedom to intervene wherever and whenever necessary to combat age discrimination.

The Commission intended to allow only truly voluntary, knowing waivers, and to provide older workers with the opportunity to obtain additional benefits in return for their agreement. Had the rule not been suspended, EEOC was prepared to act on behalf of anyone who was forced into signing a release involuntarily or without reasonable time to make a knowledgeable decision. Indeed, the rule stated that even where the above listed criteria for a knowing and voluntary agreement are present, waivers that are challenged will be assessed as to their substance and circumstances to determine whether there was fraud or duress.

The Commission would have investigated challenged waivers to determine whether they were knowing and voluntary, or whether they were used to conceal age discrimination. All of this was consistent with Commission policy to vigorously enforce the ADEA to protect the public interest of a workplace free of age discrimination. A valid private settlement would **not** have prevented the Commission from seeking to eliminate a pattern and practice of age discrimination or obtaining relief for victims who had not signed waiver agreements or had signed them under duress.

This rulemaking was designed to avoid the needless diversion of scarce Commission resources from our enforcement mandate. No public benefit is to be gained by universal supervision of ADEA settlements, extending the government's oversight even to the vast majority of such cases where the parties are mutually satisfied.

EEOC's waiver rule would have provided guidance, while allowing our resources to remain focused on vindicating the rights of victims of age discrimination. I am submitting, for the record, the rule as it was published in the Federal Register.

I'll be happy to answer any questions you may have.

FOR FURTHER INFORMATION CONTACT: Charles L. Trichilo, Hazard Evaluation Division (TS-769c), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

Office location and telephone number: Rm. 810, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703)-557-7324.

List of Subjects in 21 CFR Parts 193 and 561

Food additives, Animal feeds, Pesticides and pests.

Dated: August 17, 1987.

James W. Akerman,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, the following technical amendments are made to 21 CFR Chapter I:

PART 193—[AMENDED]

1. In Part 193: a. The authority citation for Part 193 continues to read as follows:

Authority: Sec. 409, 72 Stat. 1785 (21 U.S.C. 348).

§ 193.142 [Amended]

b. Section 193.142 is amended in the section heading and text by changing "*O,O*-diethyl *O*-(2-isopropyl-6-methyl-4-pyrimidinyl) phospohorothioate" to "diazinon" wherever it appears.

§ 193.430 [Amended]

b. Section 193.430 is amended in the section heading and text by changing "tricyclohexyltin hydroxide" to "cyhexatin" wherever it appears.

PART 561—[AMENDED]

2. In Part 561: a. The authority citation for Part 561 continues to read as follows:

Authority: 21 U.S.C. 348.

§ 561.400 [Amended]

b. Section 561.400 is amended in the section heading and text by changing "trycyclohexyltin hydroxide" to "cyhexatin" wherever it appears.

§ 561.415 [Amended]

c. Section 561.415 is amended in the section heading and text by changing "*O,O*-diethyl *O*-(2-isopropyl-6-methyl-4-pyrimidinyl) phosphorothioate" to "diazinon" wherever it appears.

§ 561.425 [Amended]

d. Section 561.425 is amended in the section heading and text by changing "2,3-dihydro-5,6-dimethyl-1,4-dithiin-1,1,4,4-tetraoxide" to "dimethipin" wherever it appears.

[FR Doc. 87-19650 Filed 8-26-87; 8:45 am]

BILLING CODE 6560-50-M

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1627

Legislative Regulation and Administrative Exemption Allowing for Non-EEOC Supervised Waivers Under the ADEA

AGENCY: Equal Employment Opportunity Commission.

ACTION: Notice of final rule.

SUMMARY: The Commission hereby provides notice of a legislative regulation and administrative exemption (under section 9 of the Age Discrimination in Employment Act of 1967 (ADEA) and 29 CFR 1627.15) allowing for non-EEOC supervised waivers and releases of private rights under the ADEA.

EFFECTIVE DATE: September 28, 1987.

FOR FURTHER INFORMATION CONTACT: John K. Light at (202) 634-7643.

SUPPLEMENTARY INFORMATION: Section 9 of the ADEA, 29 U.S.C. 628, grants the Commission broad authority to promulgate interpretive guidelines and legislative regulations on both procedural and substantive matters. Section 9 also authorizes the Commission "to establish such reasonable exemptions to or from any or all provisions of [the ADEA] as [it] may find necessary and proper in the public interest." The Commission hereby promulgates a legislative regulation and administrative exemption under section 9 of the ADEA and 29 CFR 1627.15, allowing for waivers and releases of private rights under the ADEA, 29 U.S.C. 621 *et seq.*

A Notice of Proposed Rulemaking (NPRM) regarding this rule was published in the **Federal Register** of Monday, October 7, 1985 (50 FR 40870) with a sixty-day period for public comment. In all 36 written comments were received, with 23 generally supporting the NPRM and 13 generally opposing it. A substantial number of the commenters favoring and opposing the NPRM simply stated this fact without significant substantive discussion.

Because the framers of the ADEA were concerned that delay would prejudice the claims of older workers, one of their central goals was to insure expeditious resolution of disputes. *See* 113 Cong. Rec. 7076 (Remarks of Sen. Javits); *Burns v. Equitable Life Assurance Society*, 696 F.2d 21, 24 n.2 (2d Cir. 1982). The Commission believes that requiring government supervision of releases and waivers is at odds with this congressional goal. Accordingly, the Commission has determined that it is necessary and proper in the public interest to permit waivers or releases under the Act without the Commission's supervision or approval, provided that any waivers of ADEA rights in such agreements are "knowing and voluntary." But after considering the comments, the Commission believes it is also important to provide guidance on the standards for determining whether waivers are "knowing and voluntary." The final rule also makes it clear that waivers of prospective rights or claims will not be permitted and declares that a waiver of the right to file an EEOC charge is void as against public policy.

Responding to the specific request in the NPRM that comments address whether it is necessary to develop particular standards to determine whether waivers are "knowing and voluntary," commenters were about evenly divided between those who expressed opposition to the wisdom or need for any specific standards and those who believed that some standards are desirable. Those commenters against development of particular standards generally believed that whether a waiver was "knowing and voluntary" could best be determined by the courts on a case-by-case basis as under Title VII or that such standards would be difficult for the Commission to formulate and would involve the Commission in supervising waivers. Some of the commenters believed that workable standards could not be drawn because of varying factual circumstances involved in waivers.

Those comments favoring the development of standards for "knowing and voluntary" waivers generally thought that such standards would be beneficial in insuring that waivers were transacted in a "knowing and voluntary" manner and thus would avoid later controversy. Several comments in favor of establishing standards included specific suggestions as to standards that should be used. These suggestions included simply citing that the waiver or release was "knowing and voluntary" and giving the employee one week to review the document, making specific reference to the issue of "duress," and presenting multiple item lists of considerations. These latter included suggestions that, in addition to those specified above, the waiver or release be written in plain English, provide more than token consideration, not deal with a benefit to which the employee was already entitled, concern only past acts, include a statement that the agreement was not an admission of liability by the employer, and provide that the employee would not file suit.

While the Commission recognizes that the presence or absence of one or more standards would not be dispositive of whether a particular waiver is "knowing and voluntary," it does believe that relevant factors indicative of "knowing and voluntary" action can and should be articulated in the Final Rule. Thus the rule contains guidance as to what the courts have previously regarded as indicative, and what the Commission is likely to find supportive, in demonstrating that a wiaver is "knowing and voluntary."

It should be noted that the indicators or standards listed below are presented as examples, not as limitations, for assessing the validity of waivers. Other factors that are not listed may be used in evaluating "knowing and voluntary" and not all of the following indicators or standards need be present in every case for a waiver to be valid. The Commission wishes to emphasize that waivers challenged as not "knowing and voluntary" will be evaluated on a case-by-case basis and the Commission will look to the substance, not to the form of the waiver agreement.

Following the principles established under Title VII case law, the Commission would expect valid waivers to incorporate or conform with the following fundamental indicators or standards:

(1) The agreement was in writing, in understandable language, and clearly waived the employee's rights or claims under the ADEA;

(2) A reasonable period of time was provided for employee deliberation;

(3) The employee was encouraged to consult with an attorney.

Another provision in the Notice of Proposed Rulemaking that drew several comments is the sentence that states:

> No such waivers or releases, however, shall affect the Commission's rights and responsibilities to enforce the Act.

Several commenters suggested this sentence be removed or other language substituted, making it clear the Commission will not routinely evaluate waivers but will review waivers of ADEA claims only when a charge is filed or where a waiver is raised during an investigation. In addition, some commenters suggested language stating the Commission will not seek relief for individuals who have "knowingly and voluntarily" executed releases and waivers of their ADEA rights.

After careful assessment of the comments and its enforcement responsibilities, the Commission has concluded that the present language of the provision reserves the necessary maximum flexibility and discretion for the Commission in determining what best serves the public interest in the enforcement of the ADEA. *See Equal Employment Opportunity Commission v. Cosmair, Inc.*, No. 86-1806 (5th Cir. July 16, 1987).

A number of comments addressed "waivers of prospective rights" and the question of "valid or adequate consideration." In accordance with suggestions made by several commenters, the final rule has been changed to indicate clearly that release of prospective rights or claims will not be permitted nor will consideration be recognized that includes benefits to which the employee is already entitled by law or contract.

In promulgating this rule the Commission has taken into consideration the fact that courts have consistently recognized that Congress has expressed a strong preference for voluntary settlements of employment discrimination claims and that Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, permits employers and employees to settle disputes by using waiver agreements as long as the waiver of rights and release of potential liability is "knowing and voluntary." *Alexander v. Gardner-Denver Co.*, 415 U.S. 79, 88 n.14 (1981). There is a similar preference for voluntary resolution of disputes under the ADEA. *See* 29 U.S.C. 626(d) (efforts at conciliation, conference, and persuasion to be made before resort to litigation). The Supreme Court has noted that Title VII and the ADEA share a common purpose and that similar provisions should be similarly interpreted. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979).

This conclusion is supported by section 2(b) of the ADEA which firmly establishes the goal of encouraging "employers and workers [to] find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. 621(b). Moreover, the framers of the Act were concerned that delay would prejudice the claims of older workers and one of their central goals was to insure expeditious resolution of disputes. *See* 113 Cong. Rec.7076 (Remarks of Sen. Javits) *Burns v. Equitable Life Assurance Society*, 696 F.2d 21, 24 n.2 (2d Cir. 1982).

The Commission has concluded that this exemption serves both purposes by allowing amicable resolution of disputes and releases of rights for valuable benefits, without bureaucratic oversight and delay, where such releases are in the mutual interests of both employees and employers. Requiring government supervision would delay the provision of valuable benefits or additional compensation to older employees who freely choose to release their ADEA rights or claims, and tend to discourage employers from offering such enhanced benefits to older workers. This rule is therefore intended to give older workers maximum freedom of choice. To do otherwise would perpetuate the stereotype that older workers need the protection of a paternalistic government.

The exemption does not affect the rights of victims of age discrimination who do not with to settle their claims. The Commission will ensure that individuals who decline to sign waivers receive all compensation and benefits to which they are otherwise entitled. If an individual wishes EEOC supervision of a settlement, he or she may file an EEOC charge. Furthermore, it is the Commission's position that a waiver cannot prevent an employee from filing a charge with the Commission (*see EEOC v. Cosmair, Inc.*, No. 86-1806 (5th Cir. July 16, 1987) ("A waiver of the right to file a charge is void as against public policy.")), and that older employees are protected from retaliation if they seek to challenge an executed waiver as not knowing and voluntary or otherwise invalid.

Section 7(b) of the ADEA, 29 U.S.C. 626(b), incorporates the enforcement provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* In *Lorillard v. Pons*, 434 U.S. 575 (1978), the Supreme Court held that not only the FLSA enforcement provisions but also pre-ADEA case law dealing with enforcement of FLSA rights were incorporated into ADEA section 7(b). While the FLSA like the ADEA is silent on whether an employee can release his or her rights under the Act, the case law on contractual waivers of FLSA rights does not permit waivers of bona fide disputes as to coverage or liquidated damages without government supervision. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945); *Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946).

However, the Commission believes the enforcement provisions of the FLSA that are incorporated into the ADEA must be viewed in the context of the different policy considerations underlying the two acts. Cf. *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 861 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) (The *O'Neil-Schulte* line of cases "were tied closely to the mandatory terms of particular statutes, the labor conditions that produced those statutes, and what the Court believed was a clearly discernible congressional intent.") The FLSA is a minimum wage statute. The factual issues in FLSA cases concern the number of hours worked and the rate of pay and are generally "amenable to determination with some precision." (*Runyan v. National Cash Register Corp.*, 787 F.2d 1039, 1044 n.8 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 178 (1986)); under the FLSA there is an absolute presumption that any unsupervised waivers of minimum wage rights would necessarily be against public policy (see *Brooklyn Savings Bank v. O'Neil*, *supra*). There is no such presumption under Title VII. *United States v. Allegheny-Ludlum Industries, Inc.*, *supra*; *Rogers v. General Electric Co.*, 781 F.2d 452 (5th Cir. 1986) ("A general release of Title VII claims does not ordinarily violate public policy.") The substantive rights protected by the ADEA are closely analogous to the rights protected by Title VII. Moreover, as earlier noted, the ADEA and Title VII share a common purpose of encouraging the voluntary expeditious resolution of disputes. Accordingly, the Commission believes that mandatory government supervision of ADEA releases would not serve the purpose of the ADEA and that unsupervised ADEA releases, like Title VII releases, should be permitted provided they are knowing, voluntary and non-prospective, as required under the standards governing Tile VII releases.

Recently, the Sixth Circuit Court of Appeals sitting *en banc* held that an unsupervised release of an ADEA claim in a bona fide factual dispute could be valid. *Runyan v. National Cash Register Corp.*, 787 F.2d 1039, *cert. denied*, 107 S. Ct. 178 (1986). The court reasoned that where the dispute is a factual rather than a legal one, *O'Neil* and *Gangi* do not preclude an unsupervised waiver or release under FLSA or ADEA. *Accord Equal Employment Opportunity Commission v. Cosmair, Inc.*, No 86–1806 (5th Cir. July 16, 1987); *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539 (8th Cir. 1987); *Moore v. McGraw Edison Co.*, 804 F.2d 1026 (8th Cir. 1986).

The Commission agrees with the rationale and holding of the Sixth Circuit's *Runyan en banc* decision with regard to unsupervised waivers under the ADEA and has incorporated that approach in the final rule. The Commission believes that the reasoning of the *Runyan en banc* decision responds to those commenters who felt that the ADEA does not permit unsupervised waivers because the FLSA enforcement provisions that it largely incorporates allow no such waivers. To the extent that any circuit court decision could be read to conflict with the *Runyan en banc* decision (*see Lynn's Food Stores, Inc. v. United States Dept. of Labor*, 679 F.2d 1350, 1354–55 (11th Cir. 1982) (where supervised waivers are held to be an exclusive alternative to litigation or court-supervised settlement for all FLSA claims)) the Commission's exemption authority under section 9 of the ADEA is being utilized to permit unsupervised waivers in those jurisdictions.

The Commission has determined that the remedial purposes of the Act will be best served by allowing the use of waiver agreements to resolve claims whenever employees and employers perceive them to serve their mutual interests, provided that any waivers of ADEA rights in such agreements are "knowing and voluntary." Either a clear understanding of the nature of the rights being waived or the presence of an asserted claim satisfy an initial element of whether a waiver is knowing. It is the Commission's position that a release may be valid as to claims of which a signing party has actual knowledge and those that could have been discovered upon reasonable inquiry. *See Oglesby v. Coca-Cola Bottling Co.*, 620 F. Supp. 1336, 1342 (N.D. Ill. 1985).

The Commission will apply the same standards that are applicable under current Title VII case law to ADEA waivers. Under Title VII, waivers are deemed to be "knowing and voluntary" if they clearly provide actual notice of the nature of the rights that are waived and are fully negotiated without fraud or duress. *See Rogers v. General Electric Co.*, 781 F.2d 452 (5th Cir. 1986); *Pilon v. University of Minnesota*, 710 F.2d 466 (8th Cir. 1983); *Lyght v. Ford Motor Co.*, 643 F.2d 435 (6th Cir. 1981); *EEOC v. T.I.M.E.—D.C. Freight, Inc.*, 659 F.2d (5th Cir. 1981); *Cox v. Allied Chemical Corp.*, 538 F.2d 1094 (5th Cir. 1976), *cert. denied*, 434 U.S. 1051 (1978); *Watkins v. Scott Paper Co.*, 530 F.2d 1159 (5th Cir. 1975). Relevant factors that courts have previously regarded as indicative and that the Commission is likely to find supportive in demonstrating that a waiver was entered into in a "knowing and voluntary" manner are set forth in the final rule. Similarly, the Title VII case law prohibition against recognizing a waiver of future or prospective claims (e.g., a waiver agreement dated January 1 of a given year is not applicable to claims arising after that date) will have full application to ADEA waivers. *Alexander v. Gardner-Denver Co.*, 415 U.S. at 51; *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 858 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). In addition, the Commission will require that consideration in exchange for a valid waiver under the ADEA not include employment benefits to which the employee is already entitled either by law or contract. *See Runyan v. NCR Corp.*, 573 F. Supp. 1454, 1460 (S.D. Ohio 1983), *aff'd*, 787 F.2d 1039 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 178 (1986).

Further, while the Commission takes the position that a waiver, if valid, may be a defense to any claim for individual relief for the employee who signed it, such a waiver cannot be used to justify interfering with an employee's protected right to file a charge or participate in a Commission investigation. *Equal Employment Opportunity Commission v. Cosmair*, No. 86–1806, slip op. at 5145 (5th Cir. July 16, 1987). The right to file a charge and participate in a Commission investigation is absolutely protected because it is essential to the Commission's enforcement of the ADEA. *Id.* The plain language of section 4(d) of the ADEA makes it unlawful for an employer to take action against an employee because he has, *inter alia*, filed a charge. *See Id.* at 5144. The enforcement policies underlying the ADEA strongly support this position. *Equal Employment Opportunity Commission v. Cosmair*, No. 86–1806 (5th Cir. July 16, 1987); *see Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969).

The Commission hereby provides notice that it is adopting a legislative rule and exemption allowing non-EEOC supervised waivers and releases of private rights as an exemption to the provisions of section 7 of the ADEA for any waiver of rights or release from liability by an employee or job applicant under the Act that is knowing, voluntary, and in conformity with the other requirements of this rule.

Impact Analysis—Classification-Executive Order 12291

The rule in this document is not classified as a "major rule" under Executive Order 12291 on Federal Regulations because it is not likely to result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Accordingly, no regulatory impact analysis is required.

Similarly, the Chairman of the EEOC certifies under 5 U.S.C. 605(b), enacted by the Regulatory Flexibility Act (Pub. L. 96–354), that this amendment will not result in a significant impact on a substantial number of small employers.

List of Subjects in 29 CFR Part 1627

Equal employment opportunity, Reporting and recordkeeping requirements.

Accordingly, the Commission amends 29 CFR Part 1627 as follows:

PART 1627—[AMENDED]

1. The authority citation for Part 1627 is revised to read as follows:

Authority: Sec. 7, 81 Stat. 604; 29 U.S.C. 626; sec. 9, 81 Stat. 605; 29 U.S.C. 628; sec. 11, 52 Stat. 1066, as amended, 29 U.S.C. 211; sec. 2, Reorg. Plan No. 1 of 1978, 43 FR 19807.

2. Paragraph (c) is added to § 1627.16 as follows:

§ 1627.16 Specific exemptions:

* * * * *

(c)(1) Pursuant to the authority contained in section 9 of the Act and in accordance with the procedure provided therein and in § 1627.15(b) of this part, it has been found necessary and proper in the public interest to permit waivers or releases of claims under the Act without the Commission's supervision or approval, provided that such waivers or releases are knowing and voluntary, do not provide for the release of prospective rights or claims, and are not in exchange for consideration that includes employment benefits to which the employee is already entitled.

(2) When assessing the validity of a waiver agreement, the Commission will look to, and is likely to find supportive, the following relevant factors that courts have previously identified as indicative of a knowing and voluntary waiver:

(i) The agreement was in writing, in understandable language, and clearly waived the employee's rights or claims under the ADEA;

(ii) A reasonable period of time was provided for employee deliberation;

(iii) The employee was encouraged to consult with an attorney.

These are not intended as exclusive nor must every factor necessarily be present in order for a waiver to be valid, except that a waiver must always be in writing. Moreover, even where these three factors are present, if a waiver is challenged, the Commission will look to the substance and circumstances to determine whether there was fraud or duress.

(3) No such waivers or releases shall affect the Commission's rights and responsibilities to enforce the Act. Nor shall such a waiver be used to justify interfering with an employee's protected right to file a charge or participate in a Commission investigation.

Signed this 6th Day of August at Washington, DC.

For the Commission.

Clarence Thomas,

Chairman, Equal Employment Opportunity Commission.

[FR Doc. 87-19547 Filed 8-26-87; 8:45 am]

BILLING CODE 6570-06-M

DEPARTMENT OF DEFENSE

Defense Mapping Agency

32 CFR Part 295

[DMA Instruction 5400.7]

DMA Freedom of Information Act (FOIA) Program

AGENCY: Defense Mapping Agency, DoD.

ACTION: Final rule amendment.

SUMMARY: This amendment to 32 CFR Part 295 provides a change of title to 32 CFR Part 295. It also provides the public with the names and addresses of all DMA Components, including two new Components recently established.

EFFECTIVE DATE: August 27, 1987.

ADDRESS: Defense Mapping Agency, Building 56, U.S. Naval Observatory, Washington, DC 20305-3000.

FOR FURTHER INFORMATION CONTACT: Mr. Del Malkie, (202) 653-1131.

SUPPLEMENTARY INFORMATION: In 40 FR 6336 appearing on Tuesday, February 11, 1975, the Defense Mapping Agency (DMA) published Part 295 of this title establishing the policy of the Defense Mapping Agency regarding the availability to the public of DMA information and implemented 5 U.S.C. 552. This rule states the policy of the DMA with regard to making DMA records available to members of the public and implements Department of Defense Directive 5400.7 and Department of Defense Regulation 5400.7-R, DoD Freedom of Information Act Program. (32 CFR Part 286)

List of Subjects in 32 CFR Part 295

Freedom of information.

Accordingly, 32 CFR Part 295 is amended as follows:

1. The authority citation for Part 295 continues to read as follows:

Authority: Sections 295.1 to 295.11 issued under 5 U.S.C. 301, 552, as amended by Act of Nov. 21, 1974 (Pub. L. 93-502, 88 Stat. 1-3).

2. The heading for 32 CFR Part 295 is revised to read as follows:

PART 295—DMA FREEDOM OF INFORMATION ACT (FOIA) PROGRAM

In § 295.6 paragraphs (b) (1) through (6) are revised and (b) (7) and (8) are added to read as follows:

§ 295.6 Procedure for submission of requests for DMA records by members of the public.

* * * * *

(b) * * *

(1) Director, Defense Mapping Agency, Bldg. 56, U.S. Naval Observatory, Washington, DC 20305-3000.

(2) Director, DMA Aerospace Center, 3200 South Second Street, St. Louis, Missouri 63118-3399.

(3) Director, DMA Hydrographic/Topographic Center, 6500 Brookes Lane, Washington, DC 20315-0030.

(4) Director, DMA Combat Support Center, 6101 MacArthur Blvd., Washington, DC 20315-0010.

(5) Director DMA Inter American Geodetic Survey, Bldg. 144, Fort Sam Houston, Texas 78234-5000.

(6) Director, DMA Systems Center, 8301 Greensboro Drive, Suite 800, McLean, Virginia 22102-3692.

(7) Director, DMA Office of Telecommunications Services, 1840 Michael Faraday Court, Reston, Virginia 22090-5304.

(8) Director, Defense Mapping School, Fort Belvoir, Virginia 22060-5828.

* * * * *

Linda M. Lawson,

Alternate OSD Federal Register Liaison, Department of Defense.

August 24, 1987.

[FR Doc. 87-19685 Filed 8-26-87; 8:45 am]

BILLING CODE 3810-01-M

Department of the Navy

32 CFR 732

Nonnaval Medical and Dental Care

AGENCY: Naval Medical Command, Navy, DOD.

ACTION: Final rule.

SUMMARY: The Naval Medical Command has promulgated this regulation to describe and publish the policies and procedures for obtaining inpatient and outpatient maternity, medical, and dental care from nonnaval sources worldwide for active duty Navy and Marine Corps members and reservists; outpatient care in the United States for active duty naval members of North Atlantic Treaty Organization (NATO) nations other than Canada; and inpatient and outpatient care for

Senator **Metzenbaum**. Our next panel consists of Carin Clauss, Associate Professor, University of Wisconsin Law School, Madison, WI; Judith Brown, American Association of Retired Persons, Washington, DC, and Dennis Vaughn, on behalf of the U.S. Chamber of Commerce and the California Employment Council of Washington, DC.

I might say that prior to the hearing, I requested from the Department of Labor detailed information regarding how the Department handles the issue of waiver of rights under the Fair Labor Standards Act. At this point, I am introducing in the record a copy of my letter of May 10, 1988 to Assistant Secretary Fred Alvarez and Solicitor George Salem, and also the response from Mr. Alvarez and Mr. Salem, dated May 20, 1988. The Alvarez/Salem letter makes clear that the Department of Labor does not recognize unsupervised waivers as valid under the FLSA.

[The documents referred to above follow:]

EDWARD M. KENNEDY, CHAIRMAN

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HAYDEN G. BRYAN, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON LABOR AND
HUMAN RESOURCES
WASHINGTON, DC 20510-6300

May 10, 1988

Fred W. Alvarez,
Assistant Secretary for
Employment Standards Administration
George R. Salem,
Solicitor of Labor
U. S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Mr. Alvarez and Mr. Salem:

Congress recently has expressed interest in the issue of private waivers of rights under the Age Discrimination in Employment Act (ADEA). As you know, the ADEA in its enforcement provisions incorporates the remedies and procedures set forth in section 16 of the Fair Labor Standards Act (FLSA). In that regard, the Senate Subcommittee on Labor is interested in learning as much as possible about the manner in which the Department of Labor has addressed the issue of waivers under the FLSA since the effective date of the Act.

In particular, I would appreciate your providing answers, and supporting explanations, to the following questions, all with regard to the FLSA:

1. Under what circumstances does the Secretary supervise waivers pursuant to section 16(c) of the FLSA? Does the Secretary ever take steps to supervise waivers in the absence of a pending dispute or claim?

2. What steps and procedures does the Secretary follow in supervising waivers under section 16(c)? (Please include relevant forms or other documents.)

3. In Lynn's Food Stores, Inc. v. United States, 679 F. 2d 1350 (11th Cir. 1982), a federal court of appeals held that FLSA claims may be compromised in only two ways: through Department of Labor supervision under section 16(c), or through a stipulated judgment approved by a district court in private actions brought pursuant to section 16(b). Does the Department of Labor accept Lynn's Foods as an accurate and complete statement of the law with respect to the negotiation or compromise of claims under the FLSA?

Fred W. Alvarez and George R. Salem
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4. Assume that an employee who signed a general release or waiver (not supervised by the Secretary) in connection with receiving back wages or other damages then files an FLSA complaint. If the employer asserts that the general waiver bars this claim, what position would the Department take with respect to the validity of the waiver?

5. Under what circumstances would the Secretary find that waivers are invalid? What steps would the Secretary take in such situations?

In addition, I would appreciate your providing any other information that you believe would be helpful.

Due to our time constraints in this matter, I am requesting a response by May 19, 1988.

Thank you so much for your consideration and cooperation.

Very sincerely yours,

Howard M. Metzenbaum
Chairman, Subcommittee on
Labor

HMM:kj

20 MAY 1988

Dear Mr. Chairman:

Thank you for your letter of May 10, addressed to the undersigned, concerning employee waiver of rights under the Age Discrimination in Employment Act (ADEA) and the Fair Labor Standards Act (FLSA).

Your questions and our response to each are set forth below in the order presented in your letter:

1. Under what circumstances does the Secretary supervise waivers pursuant to section 16(c) of the FLSA? Does the Secretary ever take steps to supervise waivers in the absence of a pending dispute or claim?

   Section 16(b) of the FLSA provides that individuals may file private suits in Federal or State courts to recover any back wages due and an equal amount as liquidated damages, plus attorney's fees and court costs. However, the Act also provides that such individuals waive their rights to bring private actions by accepting back wage payments under the supervision of the Department, and that these rights are terminated when the Department files a lawsuit under section 16(c) on behalf of the individuals or files a complaint seeking restraint of withholding of back wages due employees.

   In compliance actions closed administratively, individuals who accept back wages under the Department's supervision are asked to sign a receipt form, WH-58 (copy enclosed), which includes a waiver of the private right of action. As a matter of policy, the Department does not approve any substitute receipt forms which employers may prefer to use.

   Except for the circumstances described above, we are aware of no other situation in which the Department has supervised any such waivers under the FLSA.

2. What steps and procedures does the Secretary follow in supervising waivers under section 16(c)? (Please include relevant forms or other documents.)

We understand your question to relate to the Secretary's authority under section 16(c) to supervise the waiver of an employee's rights under section 16(b).

In most cases closed administratively, the employer prepares the WH-58 discussed above and presents it directly to the employee with a check for the net amount of the back wage payment. Both the employer and the employee retain copies of the signed form and a third copy is forwarded to the Wage and Hour Division (the Division) for inclusion in the investigation file.

Where there is doubt about whether the employer will make a bona fide offer of the back wages to the employees or whether a full and prompt payment will be made, the employer is asked to submit the employees' checks to the Division. The Division's Area Office then prepares the receipts and distributes the back wages to the employees.

3. In Lynn's Food Stores, Inc. v. United States, 679 F. 2d 1350 (11th Cir. 1982), a federal court of appeals held that FLSA claims may be compromised in only two ways: through Department of Labor supervision under section 16(c), or through a stipulated judgment approved by a district court in private actions brought pursuant to section 16(b). Does the Department of Labor accept Lynn's Food as an accurate and complete statement of the law with respect to the negotiation or compromise of claims under the FLSA?

   The court in Lynn's Food Stores, Inc. adopted the Department's view of the law with respect to waivers under the FLSA, as set forth in its brief filed with the Court (copy enclosed).

4. Assume that an employee who signed a general release or waiver (not supervised by the Secretary) in connection with receiving back wages or other damages then files an FLSA complaint. If the employer asserts that the general waiver bars this claim, what position would the Department take with respect to the validity of the waiver?

   As indicated above in response to question 1., the Department does not recognize waivers other than the WH-58 or, in the case of a private action under FLSA section 16(b), waivers which may be prepared under the supervision of a court.

5. Under what circumstances would the Secretary find that waivers are invalid? What steps would the Secretary take in such situations?

   As discussed above, the Department does not recognize such waivers. Where employers assert that their employees have waived their rights, the Department's policy is to advise them of this position and continue with normal investigation procedures, including the request for any back wage payments due.

We hope that the foregoing information satisfactorily responds to your inquiry. If we can be of further assistance, please do not hesitate to contact us.

Sincerely,

FRED W. ALVAREZ

GEORGE R. SALEM
Solicitor of Labor

The Honorable Howard M. Metzenbaum
Chairman, Subcommittee on Labor
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Enclosures

* U.S. GOVERNMENT PRINTING OFFICE: 1986-151-907

Receipt For Payment of Back Wages

As computed or approved by the Wage and Hour Division

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

I, ______________________________ (Type or print name of employee), hereby acknowledge receipt of payment in full

from ______________________________ (Name and location of establishment)

for the period beginning with the workweek ending ____________________ through the workweek

ending ____________________ of unpaid wages due me (as shown in the column to the right) under

the Act(s) indicated in the marked box(es):

☐ The Fair Labor Standards Act

☐ The Davis-Bacon and Related Acts

Gross amount $__________

☐ The Walsh-Healey Public Contracts Act

☐ The Contract Work Hours and Safety Standards Act

Legal deductions $__________

☐ The Service Contract Act

☐ Title III - Consumer Credit Protection Act

Net amount received $__________

NOTICE TO EMPLOYEE.—Your acceptance of back wages due under the *Fair Labor Standards Act* means that you have given up any right you may have to bring suit for such back wages under Section 16(b) of that Act. Section 16(b) provides that an employee may bring suit on his/her own behalf for unpaid minimum wages and/or overtime compensation and an equal amount as liquidated damages, plus attorney's fees and court costs. Generally, a 2-year statute of limitations applies to the recovery of back wages. Do not sign this receipt unless you have actually received payment of the back wages due.

Signature of employee ______________________________

Date ____________________ Address ______________________________ (Number, Street, (Apt. No.), City, State, ZIP Code)

EMPLOYER'S CERTIFICATION

To Wage and Hour Division, Employment Standards Administration, U. S. Department of Labor

I hereby certify that I have on this (date) ____________________ paid the above-named employee in full covering unpaid wages as stated above.

Signed ______________________________ (Employer or authorized representative) Title ____________________

PENALTIES ARE PRESCRIBED FOR FALSE STATEMENTS AND FALSE RECEIPTS

1. WAGE AND HOUR COPY

Form WH-56 (Rev. Jan. 1982)

No. 81-7747

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LYNN'S FOOD STORES, INC., d/b/a
YE OLDE GROCERY SHOPPE,

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA, Acting
by and through U.S. Department of
Labor, et al.,

Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Georgia
Augusta Division

No Preference

BRIEF FOR THE SECRETARY OF LABOR

T. TIMOTHY RYAN, JR.,
Solicitor of Labor,
BEATE BLOCH,
Associate Solicitor,
MARY-HELEN MAUTNER,
PAULA WRIGHT COLEMAN,
Attorneys,

U.S. Department of Labor,
Washington, D.C. 20210,
(202) 523-7620.

STATEMENT REGARDING PREFERENCE

This case is not entitled to preference in processing and disposition.

STATEMENT REGARDING ORAL ARGUMENT

The Secretary believes that oral argument is not necessary in this case because the basic question presented on appeal has been settled in numerous court decisions cited in this brief.

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IN THE UNITED STATES COURT OF APPEALS
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No. 81-7747

LYNN'S FOOD STORES, INC., d/b/a
YE OLDE GROCERY SHOPPE,

Plaintiff-Appellant

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UNITED STATES OF AMERICA, Acting
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Labor, et al.,

Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Georgia
Augusta Division

No Preference

BRIEF FOR THE SECRETARY OF LABOR

STATEMENT OF THE ISSUE

Whether the district court correctly dismissed, as failing to state a claim upon which relief could be granted, the employer's complaint seeking judicial approval of its private agreements with its employees waiving the employees' rights to the full amount of back wages the Department of Labor's compliance officer asserted they were owed for Fair Labor Standards Act violations, and seeking a release from liability to the employees and the Department of Labor for those violations.

STATEMENT OF THE CASE

(i) Procedural history

Lynn's Food Stores, Inc., d/b/a Ye Olde Grocery Shoppe (hereinafter "Lynn's" or "the employer") brought this action, purportedly under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* ("FLSA"), against the United States Department of Labor seeking judicial approval of agree-ments negotiated between Lynn's and its employees releasing the employer from liability for wage violations of the FLSA, and waiving the employees' rights to recover the full amount of wages the Department of Labor's compliance officer had asserted the employer owed for the FLSA violations.[1] The Department moved to dismiss Lynn's complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted, or in the alternative, for summary judgment (I R. 61).

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[1] Citations to the record are to the two volumes of the paginated record filed in this Court. Volume 1 ("I R.") contains the pleadings, while Volume 2 ("II R.") is the complete private transcript of a meeting between the employer and its employees, filed by the employer in the court below.

The court dismissed the complaint for failure to state a claim upon which relief could be granted (I R. 87). The court specifically declined to rule on whether it had jurisdiction since the complaint was dismissed on an alternative basis (I R. 87). The employer then filed its motion for reconsideration (I R. 89-90) which was denied (I R. 98), and thereafter took this appeal (I R. 99).

(ii) Statement of facts

In 1980, the Department of Labor concluded, after an official investigation, that Lynn's had violated certain provisions of the Fair Labor Standards Act (I R. 1-2, 80-81).[2/] As a result, the Department informed the employer of the specific amounts of back wages owing to approximately 35 employees. Rather than agree to make restitution to those employees affected in accordance with the Department's determination of the amount of back wages owed (I R. 81, 86), the employer instead approached its employees to obtain "settlements" of

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[2/] The employer's own description of the FLSA violations disclosed a mix of minimum wage, overtime, and record-keeping violations resulting from the employer's failure to keep proper records of the wages and hours of its employees; failure to pay its employees for all hours worked; and failure to compensate properly for all overtime hours worked (E.g., I R. 4-5; II R. 3-7).

any FLSA claims (I R. 2, 81; see generally, II R. 1-30, a private transcript of the meeting the employer's attorney held with certain employees). Approximately fourteen employees thereafter entered into private agree-ments with the employer[3/] (I R. 2-55). In the agreements, each employee involved agreed to accept substantially less than the full back wages the Department claimed were due and purported to waive the Department's claim on their behalf (Ibid.; I R. 81).[4/] Each agreement identifies the amount which the Department of Labor asserted that employee was owed (I R. 6). It states that the employee agrees to accept a pro rata share of a total sum of $1,000 (I R. 6, 81).[5/] Further, each

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[3/] Although the complaint alleges that fourteen named individuals entered into agreements, the record does not contain an agreement for Tokhyon Pak, one of the employees listed in the complaint as having executed an agreement (I R. 2).

[4/] The terms of the agreements are identical except for the amount of the back wages which each individual waives (I R. 6, 10, 14, 18, 22, 26, 30, 34, 38, 42, 46, 50, 54). Therefore, the Secretary will limit its record citations to the agreement executed by Gary Burks, found in the record at I R. 4-7.

[5/] A review of the agreements shows that the employees involved agreed to waive back wages totalling more than $10,000 for a pro rata share of $1,000 (I R. 4-55). Thus, under the agreement each employee would receive approximately one-tenth of the wages which the Department claimed due. For example, Gary Burks was owed $1,022.05 in back wages (I R. 6), but would receive $98.19, based on the 13 agreements in the record. A fourteenth agreement would further reduce each individual's share of the $1,000.

employee "waives on behalf of himself (herself) and on behalf of the U.S. Department of Labor . . . any claim for compensation [as set forth in the compliance officer's computations], and "relieves the U.S. Department of Labor . . . of the necessity or right of filing any claim against Lynn's Food Stores, Inc. . . ." (I R. 7).[6]

A further condition was that the agreements were without effect unless approved by a court of competent jurisdiction (I R. 6-7; II R. 20-21). Therefore, no employee has yet received any payment.

Lynn's then brought this action in federal district court alleging jurisdiction under the provisions of 29 U.S.C. §201 et seq., and seeking court approval of these agreements.[7]

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[6] The employee agrees to "release and forever discharge Lynn's Food Stores, Inc. . . . from any and all liability, claims or demands of any kind or nature, arising by virtue of or on account of his (her) employment with said Lynn's Food Stores, Inc., to the date hereof, which claim, action, or demand shall have arisen by virtue of any violation of the Fair Labor Standards Act, or any rule, regulation, or interpretation thereunder." (I R. 7).

[7] The Secretary of Labor currently has pending before a different district judge an action to recover the full back wages owing plus liquidated damages, and to enjoin the employer from violating the FLSA in the future. Civil Action No. CV181-169 (S.D. Ga., filed July 28, 1981).

District court's decision

The district court dismissed the employer's complaint, ruling that it failed to allege a claim upon which relief could be granted (I R. 80-88). The court stated that the only way in which it could review a proposed settlement of FLSA claims would be if it were presented to it within the framework of a suit brought by employees against their employer under Section 16(b) of the FLSA to recover for FLSA violations. Such a suit would provide the "adversarial setting" necessary to scrutinize the proposed settlement for fairness before passing a stipulated judgment on it (I R. 86). As the court pointed out, this was not such a case, and "[i]ndeed, the employees are not parties to this action and the only evidence of their position consists of pleadings furnished by their employer" (I R. 84, 86). The court concluded it had no authority to grant the relief requested and therefore dismissed the complaint for failure to state a claim without reaching the question of its jurisdiction (I R. 86-87).

SUMMARY OF THE ARGUMENT

The FLSA does not provide a cause of action by which an employer can obtain court approval of agreements entered into between it and its employees, waiving claims under the FLSA of the individual employees and of the Department of Labor, and releasing the employer from liability under the Act. Therefore the complaint seeking to have the court review and approve such agreements fails to state a claim upon which the court can grant relief.

The only causes of action provided by the FLSA are those which confer upon either employees or the Secretary of Labor the right to seek relief against offending employers (29 U.S.C. §§16(b), 16(c), 17). The employer's effort here to obtain court approval of these agreements is an attempt to circumvent the long-recognized principle that employees cannot, by private agreement with the employer, waive the protections afforded by the Act, because such an agreement would flatly contradict the Act's statutory purpose of protecting workers from the detrimental effects of substandard wages.

Furthermore, the only way in which an employer can obtain judicial sanction of a compromise settlement of back wages is by submitting to the court a proposed consent judgment in a §16(b) action brought by the employees against the employer to recover for alleged FLSA violations. With all the parties to the FLSA controversy and to the agreements before it, the court can properly scrutinize such agreements for fairness in the necessary adversarial setting. These conditions were not met here since the employees filed no §16(b) action and are not even parties to this action.

The only other means by which an employee can waive his or her right to the full statutory wages due and liquidated damages is provided in Section 16(c), whereby the employee waives the right to bring a private action under Section 16(b) by accepting a settlement supervised and approved by the Secretary of Labor. Employee waiver under this section is foreclosed here since the agreements are not supervised by the Secretary, and indeed the Secretary has rejected the employer's proposed settlement. In short, Lynn's attempt here to obtain court approval of these agreements must fail since the Act simply does not provide for the cause of action which Lynn asserts.

STATEMENT OF JURISDICTION

This court has jurisdiction to hear this appeal under 28 U.S.C. §1292(a)(1).

The employer alleged that the jurisdiction of the district court was based on the Fair Labor Standards Act, 29 U.S.C. 201 *et seq*. However, the government maintains that the district court had no jurisdiction to decide the case.

ARGUMENT

THE EMPLOYER'S COMPLAINT DID NOT STATE A CLAIM UPON WHICH THE COURT COULD GRANT RELIEF BECAUSE THE FLSA CREATES NO CAUSE OF ACTION IN AN EMPLOYER TO OBTAIN JUDICIAL REVIEW AND APPROVAL OF PRIVATE AGREEMENTS WITH EMPLOYEES WAIVING THEIR RIGHTS TO THE FULL AMOUNT OF MINIMUM AND OVERTIME WAGES.

The district court correctly dismissed Lynn's complaint for failure to state a claim upon which relief can be granted because Lynn's could prove no set of facts which would entitle it to the type of relief it seeks. In the area of the FLSA's regular minimum wage and overtime compensation requirements, the Act gives employees and the Secretary of Labor the right to seek specified relief for violations of the employer's statutory obligations.[8/] 29 U.S.C. 211(a), 216(b), 216(c),

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[8/] Affected employees may bring, under Section 16(b), an action to recover their unpaid minimum wages or overtime compensation and an additional equal amount as liquidated damages, together with attorneys' fees and costs. They may not sue for injunctive relief. To be a party plaintiff to such an employee action, an employee must file a written consent in the court in which the action is brought. The right to commence a §16(b) action and the right to become a party plaintiff to such an existing action terminate upon the filing by the Secretary of either of the two types of action the Secretary may bring.

The Secretary is authorized to bring two types of actions, one under Section 16(c), the other under Section 17. Under either section, the Secretary may obtain back wages for the affected employees. He may obtain, in addition, an equal amount in liquidated damages only under Section 16(c), and an injunction against future violations only under Section 17.

217. These are the only causes of action arising under the FLSA. The Act simply does not give an employer any cause of action against the government to obtain judicial sanction of private agreements between the employer and its employees purportedly waiving the employee's right to seek full back wages and liquidated damages for FLSA violations in exchange for partial payment of the wages the government asserts are due.[9]

The employer's action to obtain judicial sanction for these agreements is an attempt to circumvent the well-established principle that employees cannot, by agreement with their employer, waive their FLSA rights to receive the full statutory wages and liquidated damages to which they are entitled under the Act. E.g., Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707-709 (1945);

9/ Since the employer is not seeking judicial review of any final agency action, it is not asserting a claim under the Administrative Procedure Act. 5 U.S.C. 701 et seq. Indeed, there is no reviewable final agency action at the conclusion of the Department's review of an employer's wage and hour practices, because such review has no legal consequences. All that occurs as a result of an investigation is that the Department advises the employer as to whether or not the Department concludes that FLSA violations have occurred and, if so, the ways in which they should be remedied in terms of both future compliance and restitution of back wages owing affected employees. Before the employer can be held liable for any FLSA violations, there must be a suit in court by either the Secretary or the affected employees and a court finding that violations occurred.

D. A. Schulte, Inc. v. Gangi, 328 U.S. 108, 114-116 (1946).[10/] As the Supreme Court reiterated as recently as last year, permitting employees to waive their FLSA rights would "'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." Barrentine v. Arkansas-Best Freight System, 101 S.Ct. 1437, 1445 (1981) (citations omitted). Employee waivers by agreement with their employers would interfere with the statutory purposes of protecting all covered workers from detrimental living conditions; of assisting workers to correct their inferior bargaining position; and of preventing a non-complying employer whose employees are willing to waive their rights from gaining an economic advantage over complying employers (ibid.). E.g., Id. at 1445; Brooklyn Savings Bank, 324 U.S. at 706-708, 710; Schulte, 328 U.S. at 115-116; Marshall v. A & M Consolidated Independent School District, 605 F.2d 186, 190 (5th Cir. 1979); Wirtz v. Jones, 340 F.2d 901, 904 (5th Cir. 1965).

[10/] Accord, e.g., Barrentine v. Arkansas-Best Freight System, 101 S.Ct. 1437, 1444-1445 (1981); Brennan v. Veterans Cleaning Service, 482 F.2d 1362, 1370 (5th Cir. 1973); Mitchell v. Turner, 286 F.2d 104, 106 (5th Cir. 1960); Wood v. Meier, 218 F.2d 419, 420; Atlantic Co. v. Broughton, 146 F.2d 480, 482 (5th Cir. 1944), cert. denied, 324 U.S. 883 (1945).

As the district court recognized (I R. 84, 86), the only way an employer can obtain judicial sanction of a compromise settlement of the amount of the employees' back wages is by submitting to a court a proposed consent judgment in a §16(b) suit brought by the employees against the employer to recover for alleged FLSA violations. Thus, where employees bring a private action against the employer under Section 16(b) of the Act to recover unpaid wages (with or without liquidated damages) for alleged FLSA violations, and present the court with a proposed settlement, the court can scrutinize the proposed settlement for fairness before a stipulated judgment based on the voluntary settlement is entered. See Schulte, 328 U.S. at 113-114 n.8; Garrard v. Southeastern Shipbuilding Corp., 163 F.2d 960, 961 (5th Cir. 1947).

Having before the court all the parties to the FLSA controversy and the agreement -- that is, the employees as well as the employer -- provides the necessary adver-sarial setting for adequate review of the proposed settlement. Here, however, the court did not have before it the employees, for they have not filed a §16(b) action, nor are they even parties to this action. The only party to this action other than the employer is the government, which is not party to the agreements, and which could not, in any event, be bound by any judicial approval of the agreements.[11] Thus, because the employees were not parties to the action and the only evidence of their position was the "meager pleadings" included in the file (I R. 84), the court properly "hesitate[d] to elevate the status of this compromise settlement to that of a stipulated judgment" (ibid.).

Section 16(c) provides the only other statutory means by which an employee can voluntarily waive his or her right to bring suit for unpaid wages and liquidated damages. That section authorizes the Secretary of Labor to supervise payment to employees of the unpaid amount of statutory wages owing them. An employee who accepts such a supervised payment thereby waives the right to bring suit under Section 16(b) for not only the unpaid wages but also liquidated damages and other costs, provided the employer makes the agreed payment in full.[12] Aside from such a supervised settlement and waiver, employees cannot validly release their wage rights by private agreement with their employer.[13] The agreements here were not supervised by the Department of Labor, but are entirely private, as were the agreements in Brooklyn Savings Bank and in Schulte. Indeed, it is alleged that the Department of Labor rejected the employer's proffered settlement here. The agreements the employer seeks to have approved are plain and simple employee waivers of back wages to which the Department of Labor asserts they are entitled, and the employer's attempt to have them judicially reviewed and sanctioned fails to state a claim for which the court could grant relief.

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[11] It is absolutely clear that an employee cannot effectively waive the government's right to sue to remedy FLSA violations by purporting to release the employer from all liability for FLSA violations, for the government sues in the public interest, rather than exclusively as the affected employees' representative. Under Section 17, the Secretary of Labor can obtain not only an injunction to assure future compliance (a remedy plainly going beyond the interest of the particular individuals employed at the time the violations occurred) but also back wages, the purpose of which is to correct a continuing public offense rather than to collect a private debt. E.g., Marshall v. A&M Consolidated Independent School District, 605 F.2d 186, 189 (5th Cir. 1979), and cases cited therein. In bringing a suit under Section 16(c) as well, the Secretary is "an active protagonist for the double purpose of protecting private interests and vindicating public rights." Wirtz v. C&P Shoe Corp., 336 F.2d 21, 30 (5th Cir. 1964).

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[12] As the district court noted in its opinion (I R. 86), this waiver requirement is designed to encourage voluntary settlement of employees' claims by giving the employer the opportunity to avoid an assessment of liquidated damages and other costs. S. Rep. No. 640, 81st Cong., 1st Sess. (1949), reprinted in [1949] U.S. Code Cong. & Ad. News 2241, 2249. See *Sneed* v. *Sneed's Shipbuilding, Inc.*, 545 F.2d 537, 539 (5th Cir. 1977), for a description of the legislative history behind Section 16(c).

[13] Lynn's mistakenly asserts that 29 U.S.C. 253 authorizes private settlement agreements such as the ones here. That section, enacted in 1947, by its express terms validated only compromises of causes of action existing at the time of enactment. That section states, in pertinent part: "Any cause of action under the Fair Labor Standards Act . . ., which accrued prior to May 14, 1947, or any action . . . to enforce such a cause of action, may hereafter be compromised in whole or in part, if there exists a bona fide dispute as to the amount payable by the employer to his employee . . . ." 29 U.S.C. 253(a). The legislative history of the provision clearly corroborates that its applicability was limited to compromises and settlements which arose prior to enactment. The conference report on the bill states with regard to this provision:

> "It will be noted that this section of the conference agreement lays down no rule as to compromises or waivers with respect to causes of action hereafter accruing. The validity or invalidity of such compromises or waivers is to be determined under law other than this action."

House Conference Rept. No. 326, 80th Cong., 1st Sess. 12 (1947). Since the facts giving rise to the settlement agreements involved herein arose subsequent to May 14, 1947, it is clear that the statute has no applicability in the present case.

Neither case relied on by Lynn's supports its argument, for one case involved a §16(c) supervised settlement and waiver, and the other involved a settlement giving the employees all the back wages they were entitled to at the time, because of the unique procedural history of the case. In the first case, Sneed v. Sneed's Shipbuilding, Inc., 545 F.2d 537 (5th Cir. 1977), the employee's waiver of his right to sue in exchange for the full amount of back wages due occurred under the supervision of the Labor Department's Wage and Hour Division, and was therefore the type of voluntary waiver provided for in Section 16(c). The Fifth Circuit therefor held the employee was barred from later bringing a §16(b) suit.14/

14/ The Secretary disagrees with that portion of Sneed, 545 F.2d at 539 n.6, which holds that the employee's "taking" of the employer's check, although returning the check uncashed shortly thereafter, amounts to acceptance of payment in full within the meaning of Section 16(c). However that portion of Sneed has no bearing on this case.

In Thomas v. State of Louisiana, 534 F.2d 613 (5th Cir. 1976), employees of state agencies sued their employer under the FLSA and obtained a verdict for unpaid overtime compensation, liquidated damages and attorneys' fees. But before entry of judgment, the Supreme Court ruled in another case, that state employees did not have the power to file private wage suits under the FLSA. At that point, the employees had no enforceable rights under the FLSA which could be effectively bargained away. The parties nonetheless negotiated an out-of-court settlement giving the employees two years of overtime compensation, but no liquidated damages or attorneys' fees or costs. The employees later sought to void the settlement agreement after Congress amended the FLSA to overturn the Supreme Court decision and to authorize such suits. But the Fifth Circuit held that the agreement was binding on the employees, reasoning that although the agreement was not court-approved, there was no problem with disproportionate bargaining power when "a settlement gives employees everything to which they are entitled under the FLSA at the time the agreement is reached."[15] 534 F.2d at 615.

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[15] At the time, the Secretary could not obtain liquidated damages under Section 16(c).

Judge Clark, in a concurring opinion, emphasized the unusual nature of the factual situation stating that the decision "cannot be construed to approve nonjudicial settlements of wage and hour claims in situations removed from the unique facts of this case." *Ibid*. Thus the district court correctly perceived that *Sneed* and *Thomas* are readily distinguishable (I R. 84-86). Here, the agreements were not supervised by the Secretary of Labor,[16] and on their face did not give the employees "payment in full" or everything the Secretary has asserted they are entitled to receive.[17] It is apparent that the employer is simply seeking to elevate improper employee waivers to some form of apparent legitimacy by asking the court to review and sanction them. However, as the district court properly held, the law simply does not provide for the kind of cause of action Lynn's has attempted to present.[18/]

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[16] As noted in the Statement of Facts, *supra* at 5 n.7, the Secretary of Labor has brought suit against Lynn's seeking relief for the FLSA violations, and Lynn's has raised the agreements as a defense.

[17] Lynn's suggestion (Br. 16) that the *employees* can decide what constitutes "payment in full" or how much they were entitled to, is frivolous. It is nothing but a reiteration of the position, long since rejected, that employees can choose whether to accept less than the minimum wages established by statute. See *supra* at 11-12. Indeed, even where employees fail to take back wages, or affected employees cannot be located, the employer is not entitled to retain the money. Instead the money is deposited in the U. S. Treasury, subject only to the employees' claims, in order to further the statutory purpose of "protect[ing] competing enterprises from the unfair competition which would result from an employer using as working capital employee compensation unlawfully withheld." *Hodgson* v. *Wheaton Glass Co*., 446 F.2d 527, 535 (3rd Cir. 1965); *Hodgson* v. *Yb Quesada*, 498 F.2d 516 (9th Cir. 1974); *Burk Builders* v. *Wirtz*, 355 F.2d 451, 452 (5th Cir. 1966); 29 U.S.C. 216(c).

[18/] The district court found it unnecessary to reach the government's motion to dismiss for lack of subject matter jurisdiction because of its conclusion that the relief sought does not exist under the applicable law. However, the government believes that the district court lacked jurisdiction, and that the jurisdictional defect provides an independent ground for affirming the judgment. The only jurisdictional base alleged by the plaintiff was the FLSA itself, even though it appears that to some extent the employer relied on the provisions of the Declaratory Judgment Act, 28 U.S.C. §2201 (Br. 12). However, it is evident that neither is an adequate basis for asserting jurisdiction. As discussed supra, the FLSA authorizes suits by either employees or the Secretary of Labor to remedy minimum wage and overtime pay violations. Employers are granted no right to bring the type of suit presented here. Furthermore, the Declaratory Judgment Act is not an independent ground for jurisdiction, but only permits the award of declaratory relief when other bases for jurisdiction are present. Jones v. Alexander, 609 F.2d 778, 781 (5th Cir. 1980).

CONCLUSION

For the reasons stated, the judgment of the district court dismissing the complaint should be affirmed.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that copies of this brief were mailed to Mr. James B. Wall, 704 Georgia Railroad Bank Building, Augusta, Georgia 30902, on this 18th day of January 1982.

Paula Coleman

Paula Coleman

Senator METZENBAUM. Ms. Clauss, we look forward to hearing from you, and you know our rule is a 5-minute rule.

STATEMENTS OF CARIN CLAUSS, ASSOCIATE PROFESSOR, UNIVERSITY OF WISCONSIN LAW SCHOOL, MADISON, WI; JUDITH BROWN, AMERICAN ASSOCIATION OF RETIRED PERSONS, WASHINGTON, DC, AND DENNIS VAUGHN, ON BEHALF OF THE U.S. CHAMBER OF COMMERCE AND THE CALIFORNIA EMPLOYMENT COUNCIL, WASHINGTON, DC

Ms. CLAUSS. Thank you very much, Senator, for allowing me to testify today.

I spent the first 11 years of the Age Act's existence in charge of its enforcement at the Department of Labor, and although I came here today prepared to be very scholarly in my remarks, I now have to concede that I, too, am upset and distressed.

I have carefully studied the EEOC's rule giving binding effect to unsupervised waivers under the ADEA, and it is my opinion that the EEOC rule is contrary to law and misconceives the best interests of older workers.

In my prepared remarks, Senator, I spell out what I consider to be the five most serious errors that EEOC makes in promulgating that rule. But let me today address my remarks primarily in response to what Mr. Komer has said. He dealt at length with what I consider to be the EEOC's first major legal error, and that is its acquiescence in the Sixth Circuit *en banc Runyan* decision. This decision, an ADEA case, which nonetheless purports to interpret section 16(c) of the Fair Labor Standards Act incorporated into the ADEA, misconceives the Fair Labor Standards Act. It is contrary to the consistent position of the Department of Labor. It totally ignores the plain language of the 1947 and 1949 amendments, and it is just, plain wrong.

Now, unfortunately, when there is no Government agency apprising the court as to the relevant legislative history and the relevant case law, it is not surprising that a Sixth Circuit *en banc* court can make a bad mistake, and that mistake has now been perpetuated by other courts just blindly following *Runyan* without any unique analysis of their own.

The *Runyan* case attempts to understand FLS law by looking at pre-1947 decisions, and bases their understanding of waivers on two early Supreme Court decisions, the *O'Neil* case and the *Gangi* case.

What the Sixth Circuit overlooks is that although these decisions hinted that there might be some narrow room for unsupervised waives, and the Court circumscribed that very narrowly, much more narrowly than the EEOC rule—it would have been limited to cases where there were disputes only as to facts, and it would have been limited to cases where there was an actual case in controversy that had come to fruition. But nonetheless, when Congress focused on the question of waivers in the 1947 Portal-to-Portal Act amending the Fair Labor Standards Act and again in 1949, in the 1949 amendments, they did not follow the suggestion by the Supreme Court in *Brooklyn Bank* v. *O'Neil* and *Gangi* that there might be some narrow area for unsupervised waivers, and they specifically prohibited any unsupervised waivers under the Age Act.

I think, Senator, that it might be very interesting to look at the Portal-to-Portal Act because what Congress did there was to day we will allow employees to waive claims in cases where there is a bona fide dispute so long as they don't settle for less than the minimum wage and one and one-half times the regular rate, but they can only do this with respect to claims accruing prior to 1947 and a date in March. They could also waive liquidated damages for claims prior to 1947. But after 1947, they had no right to engage in unsupervised waivers, or they could engage in them but they wouldn't have any effect; they wouldn't prohibit future lawsuits. And in 1949, Congress clarified that by adopting the 16(c) language.

Now, the Sixth Circuit in *Runyan* makes no reference to any of that legislative history. In the Fair Labor Standards Act cases where the Court has been educated as to the appropriate legislative history and statutory language, both the Eleventh Circuit in the *Lynn* case, and more recently, the Seventh Circuit in an *en banc* decision in the *Walton* case, have concluded, as you have to conclude from the legislative history and the statutory language, that unsupervised waivers do not preclude employees or the Department from initiating subsequent legal action.

The other point I want to make is the assumption by the EEOC that despite *Lorillard* v. *Pons,* they can simply ignore the statutory language in the Fair Labor Standards Act.

Mr. Komer talked about procedural components following title VII in the ADEA. And it is true that Congress, although basically rejecting the title VII approach—it did provide for deferral to State agencies and for prior notice to the Federal Government—despite doing that, on the waiver issue, they adopted the Fair Labor Standards Act model.

I see my light. Let me just conclude the point I want to make here. Congress very selectively picked out sections of the Fair Labor Standards Act to incorporate, and the only reason for selecting 16(c) was to make use of the supervised waiver provision, because in 1967 when the Age Act was passed, the Secretary could at that time obtain make-whole relief through 17 and could not at that time obtain liquidated damages. So the only portion of 16(c) that made any sense was the section on supervised waivers.

Thank you very much.

[The prepared statement of Ms. Clauss follows:]

PREPARED STATEMENT OF CARIN ANN CLAUSS, FORMER SOLICITOR OF LABOR, BEFORE THE SENATE SUBCOMMITTEE ON LABOR, COMMITTEE ON LABOR AND HUMAN RESOURCES

May 24, 1988

Mr. Chairman and Members of the Committee: I am Carin Clauss, an Associate Professor of Law at the University of Wisconsin Law School, where I teach labor and employment discrimination law, and administrative law. I very much appreciate this opportunity to appear before you to discuss whether Congress should continue to suspend the final rule issued by EEOC on August 27, 1987, which purports to authorize unsupervised waivers under the Age Discrimination in Employment Act. My interest in this matter is more than academic, since I was intimately involved in the administration and enforcement of the ADEA, from 1968 to 1976, as an Associate Solicitor at the Department of Labor, where I had the primary responsibility for the legal enforcement of the ADEA, and from 1977 to 1981, as the Solicitor of Labor during the Carter Administration. In this latter capacity, I had the opportunity to work with this Committee both on the 1978 Amendments to the ADEA and on the transfer of the administration and enforcement of the ADEA to the EEOC.

I have carefully studied the EEOC's final rule authorizing unsupervised waivers, and it is my opinion that the rule is contrary to law, and, in addition, misconceives the best interests of older workers. The rule makes five basic errors:

(1) The rule mistakenly accepts the Sixth Circuit's erroneous interpretation of the Fair Labor Standards Act (FLSA) in Runyan v. National Cash Register Corp., 787 F.2d 1039 (1986), cert. denied 107 S.Ct. 178 (1986), and concludes -- contrary to the consistent position of the Department of Labor, and to the plain language of the FLS Amendments of 1949, in adding Section 16(c) to the Act -- that the FLSA allows

unsupervised waivers where the issues in dispute are factual and not legal.

(2) The EEOC then compounds this basic error by adopting a rule which authorizes unsupervised waivers in all ADEA cases, regardless of whether the issues in dispute are legal or factual, provided only that the waiver is voluntary and knowing. EEOC's reasons for making this distinction between ADEA and FLSA cases are not entirely clear, but apparently are based on its belief that FLSA claims, unlike ADEA claims, are more amenable to precise determination, and that ADEA claims should be treated instead like Title VII claims, where the courts have held that a general release of such claims does not violate public policy.

(3) EEOC's rule disregards the clear holding of the Supreme Court in Lorillard v. Pons, 434 U.S. 575, by concluding that the ADEA's explicit incorporation of Section 16(c) of the FLSA can be given a different construction when applied to an ADEA case, because of the different public policy interests in the two statutes, and because of the ADEA's substantive similarity to Title VII.

(4) EEOC's reliance on its exemption power under Section 9 of the ADEA, to justify its approval of unsupervised releases in the event that Runyan was incorrectly decided, and in the event that Section 16(c) cannot be given a different meaning for ADEA cases only, misconceives the scope of its power under that section; manifestly, EEOC cannot use its legislative rulemaking power to eliminate for older workers the specific protections provided by Section 16(c) of the FLSA.

(5) The EEOC erroneously assumes that the waiver issue is the same for both ADEA and Title VII claims, and that giving binding effect to unsupervised waivers will be more advantageous to older workers and

will lead to the expeditious resolution of disputes.

I will discuss each of these errors briefly.

First, the Sixth Circuit's en banc decision in Runyan, which was an ADEA case, misstates FLSA law. In holding that some unsupervised waivers would be recognized and given binding effect, the court relied on the Act's "silen[ce]" as to whether or not employees can release their rights to wages and/or liquidated damages, and on the suggestion by the Supreme Court in Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945) and Schulte, Inc. v. Gangi, 328 U.S. 108 (1946), that while the unsupervised waivers in those cases were invalid, there might be a limited class of cases, involving bona fide disputes over factual issues, where unsupervised settlements would be valid and binding.

But these cases, and the others relied on by the Sixth Circuit, were all decided prior to 1949. What the Sixth Circuit overlooked is that, following these decisions, and in specific reference to them, Congress amended the FLSA in 1949 by adding a new subsection (c) to Section 16, under which the Wage and Hour Administrator would have the authority to supervise the payment of the unpaid minimum wages and the unpaid overtime compensation due an employee under the Act. This subsection further provided that the agreement of the employee to accept such payment would, upon payment in full, constitute a waiver by the employee of any right of action he or she may have to recover monies due. See S.Rep. No. 640, 81st Cong., 1st Sess. (1949), reprinted in 1949 U.S. Code Cong. & Adm. News 2241, 2247. In explaining the reason for this amendment, the Report stated that there had been a decline in the amount of voluntary restitution paid by employers prior to 1949, and that one of the reasons for this decline was that "an employer who pays back wages which he has withheld in violation of the Act has no assurance that he will not be sued for an equivalent amount plus attorney's fees," and that "[o]ne of the principal effects of the committee proposal will be to assure employers who pay back wages in full under the supervision of the Wage and Hour Division that they need not worry about the possibility" of employee suits.

In other words, while the FLSA was "silent" on the waiver issue at the time of the Supreme Court's decisions in O'Neil and Gangi, it was not silent on this issue after 1949. Moreover, the 1949 amendment did not reserve some limited area for unsupervised waivers (as the Court might have allowed), but specifically provided that the only waivers that would preclude further legal action would be those negotiated or supervised by the Department of Labor. The only other exception would be cases brought by employees under Section 16(b) of the Act, and settled under the supervision of the court.

While Runyan has been followed by other courts in ADEA cases, usually simply citing Runyan, with no independent analysis of the FLSA, or EEOC's rule (see, e.g., Lancaster v. Buerkle Buick Honda Co., 809 F.2d 539 (8th Cir. 1987); EEOC v. Cosmair, Inc., L'Oreal Hair Care Div., 821 F.2d 1085 (5th Cir. 1987)), the courts in FLSA cases, where they have been apprised of the 1949 amendments, have uniformly held that the only two ways in which FLSA claims can be settled or compromised by employees is under Section 16(c) of the Act, where the settlement has been negotiated or supervised by the Department of Labor, or under Section 16(b), where a stipulated judgment is entered in an action brought by employees, after being scrutinized by the district court for fairness. See, e.g., Lynn's Food Stores, Inc. v. United States, Etc., 679 F.2d 1350 (11th Cir. 1982); Walton v. United

Consumers Club, Inc., 786 F.2d 303 (7th Cir. 1986) (en banc); Sneed v. Sneed's Shipbuilding, Inc., 545 F.2d 537, 539 (5th Cir. 1977). As stated by the Seventh Circuit in the Walton case,

> Ordinarily there would be no need for a statute allowing settlement of a dispute between employer and employees -- people may resolve their own affairs, and an accord and satisfaction bars a later suit. Yet the FLSA is designed to prevent consenting adults from transacting about minimum wages and overtime pay. . . . Section 16(c) creates the possibility of a settlement supervised by the Secretary to prevent subversion, yet effective to keep out of court disputes that can be compromised honestly.

If any further confirmation of Congressional intent concerning unsupervised waivers under the FLSA is needed, it is interesting to note Congress' action in the Portal to Portal Act of 1947, 29 U.S.C. 251 et seq., which was enacted to correct some specific problems that had arisen under the FLSA. In Section 253 of that Act, Congress allowed employees to "compromise" any cause of action which accrued prior to May 14, 1947, "if there exists a bona fide dispute as to the amount payable by the employer to his employee. . . ." (29 U.S.C. 253). This section also authorized employees to "waive" their right "to liquidated damages, in whole or in part, with respect to activities engaged in prior to May 14, 1947." Significantly, the employees retained on such authority after May 14, 1947. Congress did, however, make liquidated damages discretionary with the court, where the employer had acted reasonably and in good faith.

One unresolved difficulty with EEOC's position, which is not adequately addressed by the mere suspension of the rule, is that there is no government agency to actively assert the correct interpretation of Section 16(c) in ADEA suits, so that courts will continue to follow the incorrect analysis of the Sixth Circuit in Runyan. Moreover, without aggressive government action, it is doubtful that the Supreme Court will review this issue now or in the future. Finally, even if the courts were properly apprised as to the correct interpretation of Section 16(c), they would undoubtedly still continue to be influenced by EEOC's rule, whether EEOC can promote that rule or not. Thus, the mere existence of the rule is resulting in a substantial body of ADEA precedent that is at odds with the FLSA interpretation of Section 16(c).

EEOC's second error was to expand the erroneous Runyan holding to all ADEA cases, regardless of whether the issues in dispute are factual or legal. Moreover, the rule does not otherwise limit the class of claims that can be compromises -- as both O'Neil and Gangi would have done to protect against abuse and overreaching. Thus, the Court in O'Neil stated that where compromises are made over questions going to the existence of any liability, "the employee is in special danger of being over-reached." The Court also indicated that in order for there to be a bona fide dispute which could be compromised there must be at least a substantial doubt as to the respective rights of the parties.

Moreover, a number of lower court decisions, referred to in the O'Neil case, suggested that in addition to room for doubt, there must be an actual active dispute between the particular parties. See, e.g., Fleming v. Post, 146 F.2d 441 (2d Cir.), where the court held that a bona fide dispute would require "'actual and substantial difference of opinion' as to liability asserted and denied by the opposing parties." See also Union Producing Co. v. Pardeu, 117 F.2d 225, 227 (5th Cir.) (not under the FLSA), indicating that the type of dispute must be one which has "gone to the point of a recognized active controversy." In contrast, the EEOC rule would permit an unsupervised release in circumstances where the employee would not even be aware that he or she had a viable claim. In other words, even without regard to the ADEA incorporation of Section 16(c), EEOC's rule, under a traditional O'Neil/Gangi analysis, is much too broad, and does nothing to protect employees against abuse and overreaching.

Even assuming that factual disputes in ADEA claims may offer less opportunity for certain resolution (dealing, e.g., with motive and intent), the increased uncertainty of their claims hardly places ADEA claimants in a better position with respect to their employers than FLSA claimants, to resist any diminution of their statutory protections. Age discrimination victims, while typically earning more than the minimum wage, have an average annual income of only $15,000. Moreover, once out of work, they have less than a 50/50 chance of ever finding new employment. They often have little or no savings, and may not yet be eligible for Social Security. Given these facts, it is reasonable to assume (and we know this from anecdotal data) that many employees -- even if they recognize the potential of their claim -- would be coerced by circumstances into accepting significant compromises even where there is no bona fide dispute.

The suggestion in EEOC's rule seems to be that if EEOC has to supervise releases (in order for them to bar subsequent litigation) employers will be unwilling to offer any financial settlement without litigation. In fact, however, employers and employees regularly settle their disputes under the Fair Labor Standards Act (and Equal Pay Act) without any involvement by the Department of Labor. The difference is that these settlements are fair and equitable, and are satisfactory to both parties, so that further litigation or resort to governmental supervision is unnecessary. The fact that an employee could pursue his or her claim, even after the unsupervised settlement, meant that the settlement had to be reasonable, so that the employee would have little likelihood of success in any attempt to relitigate the issues -- which would, in and of itself, discourage any such attempts.

EEOC's third error is its assumption that the ADEA's incorporation of Section 16(c) can somehow be ignored, or given a completely different meaning in the context of Age Act cases. This assumption is directly at odds with the Supreme Court's decision in Lorillard v. Pons, 434 U.S. 575. As the Court in Lorillard recognized, although the prohibitory provisions of the ADEA are for the most part identical with those of Title VII, except that "age" has been substituted for "race, color, religion, sex, or national origin," the enforcement provisions are significantly different from the pattern of Title VII. The original "Administration bill," which borrowed enforcement provisions from both Title VII and the National Labor Relations Act, met with substantial opposition from legislators. S.Rep.No. 723, 90th Cong., 1st Sess. (1967), p. 13; 113 Cong. Rec. 7076. Senator Javits, the principal sponsor of the age discrimination legislation, proposed to follow instead the Fair Labor Standards Act, which relies for enforcement exclusively on court suits brought by aggrieved individuals or the Secretary of Labor. Section 7(b) of the ADEA provides that the Act "shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 [of the Fair Labor Standards Act]. . . . Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter." Section 7(c)(1) of the ADEA further states that "Sections 6 and 10 of the Portal-to-Portal Act of 1947 shall apply to actions under this Act."

As the Supreme Court noted in rejecting an argument that the FLSA right to a jury trial, established by case law, should not be extended to ADEA cases (Lorillard, 434 U.S. at 582):

> This selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA.

"This selectivity" is even more striking here. At the time of the ADEA, the Secretary of Labor could obtain any make whole relief in an action under Section 17; the individual's right of action was provided by Section 16(b). Since liquidated damages would be awarded only in "willful" cases, the primary function served by Congress' incorporation of Section 16(c) was the incorporation of the supervised waiver provision. In these circumstances, it strains credulity to suggest that this incorporation -- given the careful deletion of Section 16(a) of the FLSA, and of Section 11 of the Portal-to-Portal Act -- was inadvertent.

This then brings us to EEOC's fourth error -- its assertion that Section 9 of the ADEA allows it to remove ADEA cases from the supervised waiver requirement of Section 16(c) of the FLSA. EEOC claims that the Court of Appeals for the D.C. Circuit has described this Section as giving the EEOC "unusually broad discretion" (citing

American Ass'n of Retired Persons v. EEOC, 823 F.2d 600, 605 (1987). In fact, however, the court's reference was not to the Commission's authority to alter the terms of the statute, but to the numerous "may's" in Section 9, which gave the Commission almost unfettered discretion in deciding whether or not to issue any regulations at all. The question here is not whether the EEOC can be compelled to issue a regulation, but rather, what that regulation can lawfully do. While Section 9 does give the Commission the authority to "establish . . . reasonable exemptions," it is clear from settled administrative law that such exemptions would have to be consistent with the purposes of the Act, and could not supplant legislative judgments already made. Thus, whether or not the EEOC agrees with Congress' decision to incorporate the supervised waiver provision of the FLSA into the ADEA, that decision was specifically and deliberately made, and cannot constitutionally be reversed by an EEOC regulation.

Finally, I would question EEOC's reasons for wanting to abandon a supervised waiver program. One reason is that it is excessively paternalistic, and treats older workers differently than the protected groups under Title VII. But other sections of the ADEA also provide for greater governmental control over the older worker's claims. For example, unlike Title VII, a suit by the EEOC terminates the worker's right to bring his or her own suit under Section 16(b) of the FLSA. Section 7(c), ADEA. Also, unlike Title VII, the older worker has no right to intervene in a suit brought by the EEOC, to protect his or her interests from compromise or extinguishment.

EEOC also suggests that the retention of a Section 16(c) requirement for ADEA cases would discourage voluntary settlements. In fact, one reason for Section 16(c) was to encourage such settlements, since it provides the employer with absolute protection against any subsequent efforts to relitigate the issues covered by the supervised waiver. Moreover, the doom and gloom belief that the existence of a second bite at the apple will discourage voluntary, unsupervised settlements (which can be entered into expeditiously) is reminescent of the predictions following Barrentine v. Arkansas-Best Freight Systems, Inc., and Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), that collective bargaining agreements would no longer contain any protection against discrimination. This in fact has not happened, and arbitrators continue to resolve large numbers of discrimintion claims without subsequent litigation.

There are two other reasons why ADEA claims are unlike Title VII claims, and why protection from overreaching releases is necessary. The issue of a release usually does not come up under Title VII until after there is an actual controversy between the employer and protected group member. After all, an employer, in denying someone's application for hire or promotion, rarely says, "But here is a lump sum amount, which you can have if you sign this release form." ADEA claims, however, usually arise out of a termination, layoff, or forced early retirement. This is where the employer is likely to offer some lump sum payment in exchange for a release. And yet at the time the offer is made, the employee (who is unaware of who else is being terminated, and who is going to replace the terminees) may be totally unaware of a potential ADEA claim. Secondly, the ADEA requires the EEOC to attempt to eliminate any unlawful practice "by informal methods of conciliation, conference, and persuasion" before suit is initiated by either a private individual or the EEOC itself. Sections 7(b) and (d), ADEA. Given this statutory duty, it is unclear that the supervised waiver requirement would in fact require a significant increase in workload.

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Senator METZENBAUM. Thank you very much. I have a few questions, and for this panel, I'm going to ask them separately, because each of you comes from a different perspective in counter-distinction to the previous panel.

Ms. Clauss, some observers, including Mr. Vaughn from whom we will hear shortly, suggest that supervision of waivers under the FLSA is not applicable here, because FLSA cases and ADEA cases are so different. Do you share the view that FLSA cases are so simple and straightforward that FLSA waiver practice may not serve as a model for the ADEA?

Ms. CLAUSS. I don't see any major difference between the kinds of fact questions and credibility questions that you can get in Fair Labor Standards Act cases involving disputes as to hours worked and disputes as to the purpose of bonuses and the kinds of questions you get under the ADEA. You can have hard cases under both.

But even if that were so, Senator, that was a decision for Congress to make, and they decided to follow the FLSA model for better or for worse, and I don't think the EEOC can rewrite that legislative judgment on the part of Congress.

Senator METZENBAUM. Under the ADEA, is there any way an employer offering an early retirement or other exit incentive program may request a legal ruling or opinion from the Federal Government, and what importance would such a ruling or opinion have?

Ms. CLAUSS. Well, to the extent that there is a concern that employers are seeking these releases because they are genuinely confused as to what the law permits them to do, Congress carefully incorporated into the ADEA section 10 of the Portal-to-Portal Act, which provides for opinion letters from the administrator, or now from EEOC, and provides an absolute defense for any past violation if you relied on an opinion letter to your detriment.

So there is a mechanism to seek that kind of safe harbor under the Age Act.

Senator METZENBAUM. Thank you very much.

Our next witness is Judith Brown, speaking for the AARP. We are happy to have you with us.

Ms. BROWN. Thank you very much, Senator.

AARP welcomes the opportunity to discuss its concerns about the EEOC rule to submit unsupervised waivers of employees' ADEA rights. I have submitted a written statement, which I ask you to include in the record for the hearing.

Senator METZENBAUM. All of the statements today will be included in their entirety in the record.

Ms. BROWN. Almost 10 million of AARP's 29 million members are above the age of 50 and work full or part time. More than half are women; a significant percentage are minorities.

The EEOC's waiver rule is, unfortunately, consistent with its positions on every, single ADEA policy in the past 3 or 4 years. The EEOC has shown a clear bias in favor of the business community on all matters of policy under this law.

The EEOC's waiver rule was proposed in response to a Federal court case, *Runyan* v. *NCR*. The plaintiff was an experienced labor lawyer. This single unique case prompted the EEOC to issue a sweeping rule, permitting any employee to waive ADEA rights in almost any circumstance.

AARP and others, including many members of Congress, objected. We argued that it violated the language and purpose of the law and mistakenly relied upon title VII procedures.

These and all other arguments were rejected by the EEOC, which issued the final rule in July 1987. Congress responded by suspending the rule. If reinstated, the rule will not make it easier for older workers to negotiate severance agreements with their employers.

Employees affected by large-scale terminations, layoffs, and exit or early retirement incentive programs don't and can't negotiate the terms of their severance or their waiver. They are not settling a charge or claim or dispute. Rather, they are being asked to waive their rights at a time when it is impossible for them to fully know the nature or the value of those rights, and when they are under great stress.

The EEOC's rule will not protect employees; it will protect employers, by insulating them from liability when they implement enhanced benefit programs in an illegal or discriminatory manner. Such a rule obviously encourages illegal conduct.

The Supreme Court's rulings have been largely ignored by the EEOC, and hence, the lower courts, who have all relied upon the rule. In *Lorillard* v. *Pons,* the Supreme Court made clear that FLSA sections that Congress incorporated into the ADEA must be given full force and effect. Its opinion in *Brooklyn Bank* v. *O'Neil* holds that unsupervised waivers under the FLSA section are generally invalid, especially when not obtained in negotiating settlement of a pending, bona fide, factual dispute.

Thus, the Department of Labor doesn't supervise waivers under the section, except when settling a formal dispute alleging a violation of the FLSA. It doesn't consider any other waivers to be valid. Unlike the EEOC rule, employers are encouraged to obey the law as their best protection against lawsuits.

There are many advantages to this. First, it ensures that employees do not sign away their rights at a time when they are unable to determine when they are being discriminated against.

Workers are also particularly susceptible to financial as well as emotional coercion at this time. They must face issues such as getting another job, telling their families they are out of work, how are they going to pay for their children's educations, et cetera. It is hard to turn down cash when you don't know if there will be more coming in.

And in my practice in Minnesota, sir, I have dealt with many of these people. When you are told, at the age of 50 or over, that you have lost your job, you are off-center; you don't know the answers to any questions. You certainly don't know if something is legal or illegal. You are in such an emotional and financial turmoil, you're just trying to figure out what tomorrow is going to bring to you.

Second, it encourages employers to deal with employees in a fair and even-handed manner and to structure voluntary and involuntary severance programs in a nondiscriminatory manner.

Third, it evens up the relative positions of workers and employers. The EEOC's rule would let employers make a unilateral decision about the value of an employee's right at a time when the employee has no way of assessing this. The employee is really being asked to waive a prospective claim. This is unprecedented.

The EEOC argues that its rule includes protections against abuse of unsupervised waivers. The so-called "protections" are of minimal help, given the typical circumstances described above. It is impossible for the ADEA waivers to be truly knowing and voluntary, and few employees will have reason to file a charge with the EEOC once they sign a waiver, especially since it is unclear what if any relief the EEOC could give them.

Voluntary and involuntary enhanced severance programs can offer significant benefits to workers and employers. However, like every other employment practice, they may not discriminate. And since one of the purposes of the ADEA is to encourage the employment of older Americans, we must express concern and skepticism about those programs that assume older workers are the most expendable.

I strongly urge you to retain the congressional suspension of the EEOC's waiver rule.

[The prepared statement of Ms. Brown follows:]

AARP

Statement of the
AMERICAN ASSOCIATION OF RETIRED PERSONS
on
UNSUPERVISED WAIVERS UNDER THE
AGE DISCRIMINATION IN EMPLOYMENT ACT

before the
U.S. Senate Committee on Labor and Human Resources
Subcommittee on Labor

presented by
JUDITH BROWN
National Treasurer; Member, Board of Directors

May 24, 1988

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Louise D. Crooks *President* Horace B. Deets *Executive Director*

MR. CHAIRMAN AND MEMBERS OF THIS COMMITTEE:

THANK YOU FOR THIS OPPORTUNITY TO DISCUSS AARP'S CONCERNS ABOUT THE E.E.O.C. RULE TO PERMIT UNSUPERVISED WAIVERS OF EMPLOYEES' A.D.E.A. RIGHTS.

ALMOST TEN MILLION OF AARP'S 29 MILLION MEMBERS ABOVE AGE 50 WORK FULL- OR PART-TIME. MORE THAN HALF ARE WOMEN; A SIGNIFICANT PERCENTAGE ARE MINORITIES. THE E.E.O.C.'S WAIVER RULE IS, UNFORTUNATELY, CONSISTENT WITH ITS POSITIONS ON EVERY SINGLE A.D.E.A. POLICY IN THE PAST THREE OR FOUR YEARS. THE E.E.O.C. HAS NOT ONLY FAILED TO ENFORCE THE LAW AND ITS OWN REGULATIONS, BUT HAS TAKEN STEPS TO DIMINISH THE RIGHTS OF OLDER WORKERS WITH REGARD TO PENSION BENEFITS, EXIT AND EARLY RETIREMENT INCENTIVES, APPRENTICESHIP PROGRAMS, ADVERSE IMPACT CASES AND PROCESSING OF CHARGES. THE E.E.O.C. HAS SHOWN A CLEAR BIAS IN FAVOR OF THE BUSINESS COMMUNITY ON MATTERS OF POLICY.

THE WAIVER RULE

THE E.E.O.C.'S "WAIVER RULE" WAS PROPOSED IN OCTOBER 1985 IN RESPONSE TO A FEDERAL COURT CASE, RUNYAN V. NCR. RUNYAN, AN EXPERIENCED LABOR LAWYER, ENTERED INTO A CONSULTING AGREEMENT WITH HIS EMPLOYER AFTER HE WAS TERMINATED FROM HIS FULL-TIME JOB. HE SIGNED A WAIVER OF ALL CLAIMS BUT, AFTER HIS CONSULTING AGREEMENT EXPIRED, SUED HIS EMPLOYER FOR AGE DISCRIMINATION IN CONNECTION WITH HIS TERMINATION. THE SIXTH CIRCUIT ULTIMATELY RULED THAT, UNDER THE CIRCUMSTANCES, THE WAIVER WAS VALID EVEN THOUGH IT WAS NOT SUPERVISED BY THE E.E.O.C.. THE COURT REFERRED TO THE E.E.O.C.'S PROPOSED RULE IN ITS DECISION - AS HAS EVERY

SINGLE COURT THAT HAS ADDRESSED THIS ISSUE.

THIS SINGLE, CLEARLY UNIQUE, CASE PROMPTED THE E.E.O.C. TO ISSUE A SWEEPING RULE PERMITTING ANY EMPLOYEE TO WAIVE HIS OR HER A.D.E.A. RIGHTS IN ALMOST ANY CIRCUMSTANCE.

AARP AND OTHERS, INCLUDING MANY MEMBERS OF CONGRESS, OBJECTED TO THE PROPOSED RULE. AARP ARGUED THAT:

- IT VIOLATED THE PROVISIONS OF THE FAIR LABOR STANDARDS ACT INCORPORATED INTO THE A.D.E.A.;
- RELIANCE UPON TITLE VII PROCEDURES WAS MISPLACED;
- THE RIGHTS OF OLDER WORKERS WOULD BE SERIOUSLY JEOPARDIZED; AND
- THE E.E.O.C. CAN'T ISSUE BLANKET EXEMPTIONS FROM THE REQUIREMENTS OF THE A.D.E.A.

THESE ARGUMENTS WERE REJECTED BY THE E.E.O.C..

IF REINSTATED, THE RULE WILL NOT MAKE IT EASIER FOR OLDER WORKERS TO "NEGOTIATE" SEVERANCE AGREEMENTS WITH THEIR EMPLOYERS. EMPLOYEES AFFECTED BY LARGE-SCALE TERMINATIONS, LAYOFFS AND EXIT OR EARLY RETIREMENT INCENTIVE PROGRAMS DO NOT "NEGOTIATE" THE TERMS OF THEIR SEVERANCE OR THEIR WAIVER. THESE EMPLOYEES ARE NOT SETTLING A CHARGE OR CLAIM OR DISPUTE; THEY ARE WAIVING THEIR RIGHTS AT A TIME WHEN IT IS IMPOSSIBLE FOR THEM TO FULLY KNOW THE NATURE OR VALUE OF THE RIGHTS THEY ARE BEING ASKED TO GIVE UP.

THE E.E.O.C.'S RULE WILL NOT PROTECT EMPLOYEES; IT WILL PROTECT EMPLOYERS BY INSULATING THEM FROM LIABILITY WHEN THEY IMPLEMENT ENHANCED BENEFIT PROGRAMS IN AN ILLEGAL OR DISCRIMINATORY MANNER. SUCH A RULE OBVIOUSLY ENCOURAGES ILLEGAL

CONDUCT.

THE SUPREME COURT'S RULINGS ON F.L.S.A. WAIVERS AND INCORPORATION INTO THE A.D.E.A. HAVE BEEN LARGELY IGNORED BY THE E.E.O.C. AND HENCE BY THE LOWER COURTS, ALMOST ALL OF WHICH CITE THE E.E.O.C.'S RULE OR AN E.E.O.C. BRIEF IN THEIR OPINIONS. (NOT SURPRISINGLY, A FEDERAL AGENCY'S INTERPRETATION OF THE LAWS IT IS ENTRUSTED TO ENFORCE CARRIES GREAT WEIGHT WITH THE COURTS. NONETHELESS, THE LOWER COURT OPINIONS ON THIS ISSUE - INCLUDING RUNYAN - ARE FAR NARROWER IN ANALYSIS AND FACTS THAN THE BROAD E.E.O.C. FINAL RULE AND HENCE DO NOT SUPPORT THE RULE.)

THE SUPREME COURT MADE CLEAR IN LORILLARD v. PONS THAT THE F.L.S.A. SECTIONS CONGRESS CHOSE TO INCORPORATE INTO THE A.D.E.A. MUST BE GIVEN FULL FORCE AND EFFECT. IN BROOKLYN BANK v. O'NEILL, THE COURT HELD THAT UNSUPERVISED WAIVERS UNDER THIS F.L.S.A. SECTION ARE GENERALLY INVALID - ESPECIALLY WHEN NOT OBTAINED IN NEGOTIATED SETTLEMENT OF PENDING BONA FIDE FACTUAL DISPUTE. (EVEN RUNYAN, AND ALL THE CASES RELIED UPON BY THE E.E.O.C. TO SUPPORT ITS RULE, RECOGNIZED THIS DISTINCTION AND LIMITED THEIR HOLDINGS TO UNSUPERVISED WAIVERS OF BONA FIDE FACTUAL DISPUTES. THE E.E.O.C. RULE IS NOT SIMILARLY LIMITED.) THUS, THE DEPT. OF LABOR DOESN'T SUPERVISE WAIVERS UNDER THIS SAME SECTION EXCEPT WHEN SETTLING A FORMAL DISPUTE ALLEGING A VIOLATION OF THE F.L.S.A. IT DOESN'T CONSIDER ANY OTHER WAIVERS TO BE VALID. UNLIKE THE E.E.O.C., THE DEPT. OF LABOR ENCOURAGES EMPLOYERS OBEY THE LAW AS THEIR BEST PROTECTION AGAINST LAWSUITS.

THE E.E.O.C. SHOULD FOLLOW THE DEPT. OF LABOR'S PRACTICE.

BY PRESUMING THE INVALIDITY OF UNSUPERVISED WAIVERS, THE LAW DISCOURAGES EMPLOYERS FROM SEEKING WAIVERS IN NON-ADVERSARIAL CIRCUMSTANCES WHERE THERE IS NO PENDING AGE DISCRIMINATION DISPUTE, SUCH AS EXIT INCENTIVE PROGRAMS. SUPERVISION THAT WOULD MAKE SUCH WAIVERS TECHNICALLY LEGAL IS UNNECESSARY, UNDESIRABLE AND SUBVERTS THE INTENTION OF CONGRESS TO PROVIDE MAXIMUM PROTECTION TO EMPLOYEES FROM AGE-BASED EMPLOYMENT DISCRIMINATION.

THERE ARE MANY ADVANTAGES TO THIS. FIRST, IT INSURES THAT EMPLOYEES DO NOT SIGN AWAY THEIR RIGHTS AT A TIME WHEN THEY ARE UNABLE TO DETERMINE WHETHER THEY HAVE BEEN DISCRIMINATED AGAINST. WORKERS ARE ALSO PARTICULARLY SUSCEPTIBLE TO COERCION AT THIS TIME. THEY MUST FACE ISSUES SUCH AS GETTING ANOTHER JOB; TELLING THEIR FAMILIES THEY'RE OUT OF WORK; HOW TO PAY FOR THEIR CHILDREN'S EDUCATION, ETC. IT'S HARD TO TURN DOWN CASH WHEN YOU DON'T KNOW IF MORE WILL BE COMING IN.

SECOND, IT ENCOURAGES EMPLOYERS TO DEAL WITH EMPLOYEES IN A FAIR AND EVEN-HANDED MANNER AND TO STRUCTURE VOLUNTARY AND INVOLUNTARY SEVERANCE PROGRAMS IN A NON-DISCRIMINATORY MANNER.

THIRD, IT EVENS-UP THE RELATIVE POSITIONS OF WORKERS AND EMPLOYERS. THE E.E.O.C.'S RULE WOULD LET EMPLOYERS MAKE A UNILATERAL DECISION ABOUT THE VALUE OF AN EMPLOYEE'S RIGHTS AT A TIME WHEN AN EMPLOYEE HAS NO WAY OF ASSESSING THIS BECAUSE IN REALITY, THE EMPLOYEE IS BEING ASKED TO WAIVE A PROSPECTIVE CLAIM. THIS IS UNPRECEDENTED.

THE FACT THAT UNSUPERVISED WAIVERS HAVE BECOME A TROUBLESOME ISSUE UNDER THE A.D.E.A., BUT NOT UNDER TITLE VII, HIGHLIGHTS THE

PROCEDURAL AND PRACTICAL DIFFERENCES BETWEEN THESE TWO LAWS. TITLE VII RIGHTS ARE RARELY IMPLICATED IN VOLUNTARY OR INVOLUNTARY ENHANCED SEVERANCE PROGRAMS; A.D.E.A. RIGHTS OFTEN ARE. TITLE VII WAIVERS ARE RARELY REQUESTED EXCEPT IN ADVERSARIAL CIRCUMSTANCES, WHERE A DISCRIMINATION CHARGE OR LAWSUIT IS BEING SETTLED; IN CONTRAST, A.D.E.A. WAIVERS ARE MOST FREQUENTLY REQUESTED IN CIRCUMSTANCES DEVOID OF A CHARGE OR PENDING DISPUTE REGARDING DISCRIMINATION. BECAUSE OF THE MAGNITUDE OF THESE SEVERANCE PROGRAMS, HUNDREDS OF THOUSANDS OF EMPLOYEES CAN BE ASKED TO WAIVE THEIR A.D.E.A. RIGHTS IN ADVANCE OF ANY POSSIBLE KNOWLEDGE OR EVIDENCE OF AGE DISCRIMINATION. THERE IS SIMPLY NO COROLLARY UNDER TITLE VII.

CONGRESS CLEARLY HAD GOOD REASONS FOR CHOOSING DIFFERENT ENFORCEMENT SCHEMES FOR THESE TWO LAWS.

THE RULE WILL ALSO SIGNIFICANTLY INCREASE PLAINTIFF'S PROCEDURAL OBSTACLES. THE A.D.E.A. PRESUMES THE INVALIDITY OF UNSUPERVISED WAIVERS; THE E.E.O.C.'S RULE TURNS THIS ON ITS HEAD. PLAINTIFFS AND CHARGING PARTIES WILL BE FORCED, FOR THE FIRST TIME, TO REBUT A PRESUMPTION OF VALIDITY BY PROVING THAT A WAIVER WAS "KNOWING AND VOLUNTARY" BEFORE THEY CAN ASSERT A VALID CLAIM. THIS IS AN ENORMOUS AND COSTLY BURDEN THAT MOST PLAINTIFFS CAN'T AFFORD EITHER FINANCIALLY OR EMOTIONALLY.

THE E.E.O.C. ARGUES THAT ITS RULE HAS A NUMBER OF PROTECTIONS AGAINST ABUSE OF UNSUPERVISED WAIVERS. THESE SO-CALLED "PROTECTIONS" ARE OF MINIMAL HELP. BECAUSE EVIDENCE OF AGE DISCRIMINATION IN LARGE SCALE TERMINATIONS IS OFTEN

UNAVAILABLE UNTIL LONG AFTER ANY INDIVIDUAL WAIVER IS SIGNED, IT IS IMPOSSIBLE FOR THE WAIVER TO BE TRULY "KNOWING AND VOLUNTARY." FURTHERMORE, FEW EMPLOYEES WILL HAVE REASON TO FILE A CHARGE WITH THE E.E.O.C. ONCE THEY HAVE SIGNED A WAIVER, ESPECIALLY SINCE IT IS UNCLEAR WHAT, IF ANY, ADMINISTRATIVE RELIEF THE E.E.O.C. COULD PURSUE ON THEIR BEHALF.

EMPLOYERS ARGUE THAT THEY WON'T OFFER THESE PROGRAMS - OR WILL OFFER LESS VALUABLE ONES - IF THEY CAN'T GET WAIVERS. THIS MAKES NO SENSE AND IS CONTRADICTED BY THE FACT THAT, AS YOU HAVE NOTED MR. CHAIRMAN, MANY LARGE COMPANIES OFFER ENHANCED SEVERANCE AND EARLY RETIREMENT PACKAGES WITHOUT REQUESTING WAIVERS. EMPLOYERS REALIZE SIGNIFICANT BENEFITS, INCLUDING GOOD PUBLIC RELATIONS AND INCREASED EMPLOYEE MORALE. MOST IMPORTANT, AN EMPLOYEE WHO LEAVES WITH AN ENHANCED BENEFIT PACKAGE IS LIKELY TO BE HAPPIER ABOUT LEAVING AND LESS LIKELY TO LITIGATE THAN ONE WHO IS SIMPLY TERMINATED. INDEED, THAT'S THE REAL REASON THESE PACKAGES EXIST. THIS WOULD ARGUE FOR GREATER, NOT LESS, BENEFITS IN THE ABSENCE OF WAIVERS.

VOLUNTARY AND INVOLUNTARY ENHANCED SEVERANCE PROGRAMS CAN OFFER SIGNIFICANT BENEFITS TO WORKERS AND EMPLOYERS. HOWEVER, LIKE EVERY EMPLOYMENT PRACTICE, THEY MUST BE CAREFULLY STRUCTURED AND SCRUTINIZED TO ENSURE THAT THEY DO NOT DISCRIMINATE. AND, SINCE ONE OF THE PURPOSES OF THE A.D.E.A. IS TO "ENCOURAGE THE EMPLOYMENT OF OLDER AMERICANS," WE MUST EXPRESS CONCERN AND SKEPTICISM ABOUT THOSE PROGRAMS THAT ASSUME OLDER WORKERS ARE THE MOST EXPENDABLE. PROGRAMS NOT TARGETED OR

RESTRICTED BY AGE CAN JUST AS EASILY ACCOMPLISH AN EMPLOYERS' GOALS.

THE A.D.E.A.'S PROHIBITION AGAINST UNSUPERVISED WAIVERS IS NOT DESIGNED TO ASSIST THE FEW EMPLOYEES WHO ACTUALLY CAN NEGOTIATE THE TERMS OF THEIR SEVERANCE FROM THEIR EMPLOYER. THESE PERSONS ARE UNLIKELY TO SUE. IT IS THE MANY THOUSANDS OF EMPLOYEES WHO ARE UNABLE TO NEGOTIATE AND ARE UNAWARE UNTIL MUCH LATER THAT THEY WERE DISCRIMINATED AGAINST THAT THE LAW PROTECTS - AND THAT THE E.E.O.C.'S WAIVER RULE IGNORES.

I STRONGLY URGE YOU TO RETAIN THE CONGRESSIONAL SUSPENSION OF THE E.E.O.C.'S WAIVER RULE.

Senator **Metzenbaum**. Thank you, Ms. Brown, for a good statement on behalf of AARP.

A number of courts of appeals have ruled that unsupervised waivers of ADEA rights are legal. Doesn't this undermine your position that the EEOC rule permitting unsupervised waivers is illegal?

Ms. **Brown**. We feel there are a number of reasons why the EEOC's reliance upon these court cases is misplaced. First, in virtually every one of these cases, the court relied either on the EEOC brief or the EEOC's proposed rule. Thus the reliance, again as you indicated before, is bootstrapping, because in one of the most important cases relied on, the plaintiff was a labor lawyer and certainly knew his rights.

Second, the EEOC's rule is far broader than any of the holdings in these cases. Every single one of these cases arose in the context of the settlement of a bona fide factual dispute. The courts' opinions were limited to waivers in these circumstances.

For example, the opinion in *Runyan* limited itself to waivers of factual disputes and specifically refused to extend its holdings to waivers of legal disputes.

In contrast, the EEOC rule would validate unsupervised waivers in all circumstances, even when there is no pending dispute, and would extend to legal as well as factual issues raised in any subsequent litigation.

It is worth nothing that when early retirement incentive programs are disputed, the issues are almost invariably legal, not factual.

Third, none of these cases involved early retirement or exit interview programs, which is where the EEOC rule is intended to and will have its greatest impact.

Senator **Metzenbaum**. The EEOC says it does not have the resources to supervise waivers under the ADEA. Is it your position that Congress should appropriate more funds to enable the EEOC to supervise waivers? If not, how can the EEOC supervise the thousands of waivers that are signed each year? Do you think it might be possible to have in each local community some voluntary group of lawyers, or some other way to have some supervision of these waivers?

Ms. **Brown**. We have not looked into that kind of a proposal. However, we do not agree with EEOC's cost estimate and especially with the assumptions which they have based it upon.

As the Department of Labor has recognized when enforcing the same provision, it is not EEOC's affirmative obligation to actively supervise all waivers. Rather, the law simply tells employers that unsupervised waivers are unenforceable.

The EEOC should follow, we think, the practice of the Department of Labor and refuse to supervise waivers that are not requested in settlement of a pending charge or claim. This would send a strong message to employers that they shouldn't be asking for waivers in nonadversarial circumstances. The only purpose for such waivers is to insulate employers from liability for illegal conduct.

It cannot be emphasized more strongly that it is not the EEOC's job to look for ways to protect employers. The fact that employers may offer cash or other benefits in exchange for waivers is irrelevant. An employer who discriminates shouldn't be protected. An employer who doesn't discriminate is well-protected from litigation.

I'd like to point out that since the EEOC admits that it never supervised any waivers, I don't know how it quantified the costs for now doing so. The EEOC should not assume that it will have to sit in on thousands of individual negotiations between employers and employees. In addition to the reasons I have stated above, the hundreds of thousands of workers who participate in exit incentive programs do not negotiate the terms of their severance.

Senator METZENBAUM. Thank you very much, Ms. Brown.

Our last witness, the cleanup hitter, is Mr. Dennis Vaughn, on behalf of the U.S. Chamber of Commerce and the California Employment Council, Washington, DC.

You might tell us, Mr. Vaughn, where you are from.

Mr. VAUGHN. I am from Los Angeles, CA originally, Senator Metzenbaum, and I've been here in Washington for the last 3 years, practicing with my law firm.

Senator METZENBAUM. And do you want to state the name of your law firm for the record?

Mr. VAUGHN. The law firm is Paul, Hastings, Janofsky & Walker.

Senator METZENBAUM. I see it is in your statement. We are very happy to have you with us, Mr. Vaughn. Please proceed.

Mr. VAUGHN. Thank you very much, Senator Metzenbaum, for the opportunity to appear before you here this morning. I can tell that you very carefully read the testimony that all the parties have submitted, including mine, based on your earlier questions, so I'm not going to attempt to summarize the testimony. Instead, I am going to go directly to what I think is the crux of the issue.

Senator METZENBAUM. May I just hold you for a minute? It is my understanding that Ms. Brown is trying to make a noon plane, and if she sits here, she is going to miss that plane. So Ms. Brown, if you want to leave to catch your plane, please feel free to do so.

Ms. BROWN. Thank you very much, Senator.

Senator METZENBAUM. And I apologize to you, Mr. Vaughn, for interrupting you.

Mr. VAUGHN. That is perfectly all right. Ms. Brown isn't the first person who has walked out on a presentation of mine. [Laughter.]

I want to turn to what I think is really the crux of the issue here, that the Committee needs to keep foremost in its consideration in deciding what should be done in this area, and that is whether or not the Committee action in extending the moratorium on the EEOC rule, if that's what you elect to do, whether that will be in fact counterproductive to the interests of older employees who are involved in terminations from their employment. Now, the reason I ask the question is this.

Under the law as it presently exists, as reflected by the decisions of the five courts of appeals that have been referred to, an employer and an employee may voluntarily enter into an agreement relative to the termination of that employee's employment, and that agreement can provide enhanced benefits for the employee, and in exchange for the enhanced benefits, the employer may seek a release.

The question is, If an employer may not seek a release, what will employers do? Will they continue to offer enhanced benefits? Will they offer benefits that, although may be enhanced, are less enhanced than they are now? Or will they cease to provide enhanced benefits?

Now, your committee conducted a study, and you have referred to some of the largest employers in the United States who indicated to you that they did not seek releases in connection with early retirement.

I would pose the question whether or not the benefits they were talking about, Senator Metzenbaum, were enhanced benefits. Were they greater retirement benefits than the employees would have been entitled to receive in any event under the policies of those companies?

And if they were——

Senator METZENBAUM. Yes, they were.

Mr. VAUGHN [continuing]. They were—then I would suggest that—and I don't doubt at all your survey—but my personal experience in representing employers in a variety of different industries throughout the United States, both in the East and in the West, is that increasingly employers are seeking releases where they provide enhanced benefits. Because we have an increasingly litigious society, they see more and more claims of all sorts being filed, and they realize that if they are going to give something more than they have to under law, or by policy, then they should have some assurance that litigation will not arise out of it.

And I'd like to give Mr. Graham's case as simply an example. Mr. Graham said that he received enhanced severance benefits of $20,000. He said he also received an enhanced pension benefit of $700 or $800, I assume per month. Mr. Graham is 55 years old. A quick calculation, given his normal life expectancy, would indicate that the total benefits he received that were enhanced, over those he otherwise would have received, were in the vicinity of about $200,000.

Now, that is a very, very significant added consideration by the employer, and I don't think it is inappropriate at all that the employer under those circumstances would request that a release be signed, which is what it did.

The employer could have provided no enhanced benefits at all. It could have eliminated Mr. Graham's option to consider whether he wanted enhanced benefits in exchange for a release. It could have said no enhanced benefits. Or, it might have created a reserve in the event of litigation by reducing the amount, so it was $50,000 more, or $100,000 more.

But Mr. Graham benefited very, very materially. Remember, he consulted a lawyer. He got the advice of his lawyer. The lawyer told him it probably isn't worth fighting, because whatever more you might get wouldn't be enough more to pay the lawyer's fees involved.

So he made a voluntary and knowing decision. He didn't like to be put in that position, but the other alternative was to have not had that decision to make at all, to not have been granted the benefits. And I think that is what will happen if employers cannot rely on releases—either that, they won't give the benefits, or they will give them, but their effectiveness will be contingent upon the process of supervision and approval by the EEOC.

And while I have no empirical data, statistics, to prove how much that would add to delay, you can see that one case being processed here in the normal course has taken nine months. Now, imagine if the EEOC were inundated with tens of thousands, hundreds of thousands, of releases to supervise and review.

I see the red light is on, so if that is the indicator that I should cease, I will do so.

Senator METZENBAUM. You got the message. Thank you.

[The prepared statement of Mr. Vaughn with an attachment follows:]

TESTIMONY OF DENNIS H. VAUGHN
OF BEHALF OF THE CALIFORNIA
EMPLOYMENT LAW COUNCIL
AND THE CHAMBER OF COMMERCE
OF THE UNITED STATES
BEFORE THE LABOR SUBCOMMITTEE
OF THE SENATE LABOR AND
HUMAN RESOURCES COMMITTEE

May 24, 1988

Mr. Chairman and Members of the Committee:

My name is Dennis Vaughn. I am a partner in the law firm of Paul, Hastings, Janofsky & Walker and I am testifying on behalf of the California Employment Law Council ("CELC" or "the Council") and the Chamber of Commerce of the United States ("the Chamber"). I am grateful for the opportunity to express the concerns of the Council and the Chamber about possible legislative changes that would prohibit employers and employees from settling age discrimination claims unless the employee has first filed a discrimination charge with the EEOC and the proposed settlement has been approved by the Commission.

The CELC is a voluntary, non-profit organization comprised of approximately 60 employer-members representing a broad segment of California's employer community. CELC members employ in excess of 400,000 California employees. CELC was formed for the general purpose of promoting the common interests of employers and the public in sound government policies, procedures, and laws pertaining to employment practices.

The Chamber is the world's largest federation of business companies and associations. It represents approximately 180,000 businesses of every type throughout the country, plus several thousand organizations, such as local and state chambers of commerce and professional and trade associations. The Chamber has a strong interest in the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("the ADEA"), and in any amendment that might curtail the ability of parties to reach settlements under the Act.

Both the Council and the Chamber are very concerned about recent Congressional action that temporarily suspended regulations promulgated by the EEOC which had recognized that employers and employees could settle age discrimination claims without obtaining advance approval from the EEOC, provided such settlements were knowing and voluntary. The temporary suspension lasts through the end of fiscal year 1988, and Congress presumably must now consider whether to let the matter stand, with the result that the suspension concludes at the end of fiscal 1988, or to extend the suspension or make it permanent. The CELC believes that any extension would be unwise because:

1) It would be contrary to established law governing settlements under the ADEA and similar statutes prohibiting employment discrimination.

2) It would be contrary to the interest that both employers and employees have in negotiating settlements of age discrimination claims. Such settlements often result in very substantial payments to older employees at a time when they are seeking work and can most readily use the money. If Congress provides that settlements and releases will no longer be effective without prior EEOC approval, most employers will stop offering generous severance packages to laid off employees in exchange for a settlement and release. Instead, employees who are laid off will be forced to file a charge and attempt to negotiate a settlement with their employer subject to eventual approval by the EEOC. Such a settlement may not be forthcoming, or if it is, years may pass before final approval is obtained from the EEOC and the employee receives any benefit from the settlement.

3) A further suspension of the EEOC's regulations is not necessary to protect older workers. The EEOC's regulations permit any employee to challenge a settlement if he believes that he entered into it without the opportunity to know and understand his rights or if he believes that he did not act voluntarily in agreeing to a settlement. Even if the EEOC finds that a settlement is knowing and voluntary, the employee can still file suit and have the courts reexamine the question of whether a settlement was knowing and voluntary. The settlement is only effective if the EEOC and the courts both conclude that it was knowing and voluntary.

I would like the opportunity to address each of these three points in depth. Before I do, however, I would like to point out that the debate on this issue has suffered somewhat by the repeated reference to settlements not approved by the EEOC as "unsupervised waivers." The settlements authorized by the EEOC's regulations are not in any sense unsupervised. To the contrary, if any employee has a complaint about his settlement, he can obtain detailed supervision and review by both the EEOC and the courts of the circumstances under which the settlement was reached in order to make certain that the settlement was knowing and voluntary.

I think it is also somewhat misleading to be talking about waivers. A waiver usually implies that you are giving up something for nothing and completely abandoning your rights. As someone who has negotiated many such settlements, I can assure you that this is not the case with age discrimination settlements. In many cases, to avoid the very substantial expense of litigation and the uncertainties associated with jury trials under the ADEA, employers are willing to pay very substantial sums to avoid litigation. Settlements providing for severance payments in amounts equal to $25,000 or $50,000 are common. Thus, we are talking here about settlements, not waivers in the sense of giving up something for nothing.

With this in mind, I would like to turn to my three points:

I. Every Court Of Appeals That Has Considered The Issue Has Correctly Ruled That Employers And Employees Can Settle Claims Of Age Discrimination Without The Need For Prior EEOC Approval Of Each Such Settlement.

The EEOC regulations in question have been attacked as supposedly inconsistent with the ADEA because they recognize that employers and employees can settle age discrimination claims without prior EEOC approval. When the EEOC first considered adopting this regulation, the law on this question was relatively unsettled. Since that time, however, five courts of appeals have ruled on this issue. Every single one of these courts has held that settlements and releases under the ADEA do not have to have prior EEOC approval before they become effective.*/ In two of these cases, plaintiffs petitioned the Supreme Court for further review, but the Court declined to hear the matter.

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*/ See Valenti v. International Mill Services, Inc., 45 FEP Cases 1054 (3d Cir. 1987); Runyan v. National Cash Register Corp., 787 F.2d 1039 (6th Cir.) (en banc), cert. denied, 107 S.Ct. 178 (1986); EEOC v. Cosmair, Inc., 821 F.2d 1085 (5th Cir. 1987); Lancaster v. Buerkle Buick Honda Co., 809 F.2d 539 (8th Cir.), cert. denied, 107 S.Ct. 3212 (1987); Dorosiewicz v. Kaiser-Roth Hosiery, Inc., 823 F.2d 546 (4th Cir. 1987).

Opponents, however, have continued to argue that the EEOC must give prior approval to all settlements based on the language of the minimum wage and overtime enforcement provisions of Section 16(c) of the Fair Labor Standards Act, which Congress incorporated by reference when it enacted the ADEA. Every Court of Appeals that has considered this argument has rejected it. These courts have noted the substantial differences between minimum wage or overtime cases under the FLSA and discrimination cases under the ADEA. In FLSA cases the factual issues are usually limited to simple and straightforward calculation of the number of hours an employee has worked and his or her rate of pay. There is little room for factual dispute as to these issues and thus little justification for the negotiation of settlements. In age discrimination cases, by contrast, "the factual issues frequently concern determination of motive and intent." Runyan v. National Cash Register Corp., 787 F.2d at 1044 n. 8. In cases like these, courts have found that requiring prior EEOC approval of every settlement and release would be contrary to Congress' stated preference "to encourage voluntary resolution of disputes under the ADEA." Id. at 1045.

The uniform view of the courts is also reinforced by the legislative history of the ADEA. When the statute was enacted, Senator Jacob Javits, a leading sponsor of the legislation, stated that an important objective was to avoid the "delays which plague so many of our agencies, such as the EEOC and the NLRB. The EEOC, for example, is already years behind in disposing of its docket. Such delay is always unfortunate, but it is particularly so in the case of older citizens to whom, by definition, relatively few productive years are left."*/

Likewise, Senator Williams argued that the Act should allow the employee "to resolve the dispute himself or work out a compromise with an employer."**/ The Act's sponsors repeatedly emphasized the desirability of informal conciliation and settlements, recognizing that "the best relationship is voluntary."*/

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*/ Age Discrimination in Employment: Hearings on S. 830 and S. 786 Before the Subcommittee on Labor of the Senate Committee on Public Welfare, 90th Cong., 1st Sess. 24-25 (1967).

**/ 123 Cong. Rec. S. 17275 (daily ed. Oct. 19, 1977) (statement of Sen. Williams) (emphasis supplied).

While the courts have decided that settlements and releases do not require prior EEOC approval in every case, courts have examined settlements and releases carefully to make sure that they have been entered into knowingly and voluntarily. Thus, for example, in the Runyan case, the court found that a release and settlement agreement was knowing and voluntary because the employee who signed the release, Mr. Runyan, was "a well-paid, well-educated, labor lawyer with many years of experience in this area. Indeed, evidence in the record suggests that [the employee] tried to take advantage of [the employer] by taking the full benefit of a reasonable and understood bargain, while attempting to part with what he thought might be only illusory consideration in return." 787 F.2d at 1044.

A similar attempt to take the money, but renege on the deal, was likewise thwarted by the court in Hand v. Dayton-Hudson, 795 F.2d 757 (6th Cir. 1985). In that case, an employee, Mr. Hand, accepted $38,000 in exchange for signing what purported to be a release of all claims against his employer. What the employer did not know was that Mr. Hand had secretly retyped the settlement agreement so that it preserved intact his claims for age discrimination and breach of contract. After cashing the check, Mr. Hand filed suit. The Court of Appeals dismissed the age discrimination claim as barred by the settlement agreement given the employee's "intentional fraud." 775 F.2d at 759.

These are the kinds of settlement agreements and releases that the courts are enforcing and which they ought to enforce. Interestingly enough, if Congress had amended the ADEA to require prior EEOC approval of all settlements, both Mr. Runyan and Mr. Hand would have been successful in their efforts to take the money and sue.

II. The Challenged EEOC Regulations Merely Establish Standards For Determining Whether Settlements And Releases Are Knowing And Voluntary.

The EEOC's regulations make no substantive change in the law by recognizing that prior EEOC approval is not required of every settlement. Instead, they reflect the consensus view of the courts on this issue. The principal effect of the challenged regulations, therefore, is to establish standards for assessing whether settlement agreements and releases are knowing and voluntary. In this regard, the regulations are highly protective of the rights of employees, perhaps too much so. The regulations provide that a settlement and release will only be considered valid if:

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*/ Age Discrimination in Employment, supra p. 89 (remarks of Sen. Yarborough).

(1) The agreement was in writing, in understandable language, and clearly waived the employee's rights or claims under the ADEA;

(2) A reasonable period of time was provided for employee deliberation; and

(3) The employee was encouraged to consult with an attorney.

The regulations also provide that employees cannot release or settle matters pertaining to future rights. Thus, an employer could not ask employees to sign an agreement stating that in the future they would not be covered by the ADEA. Similarly, a release is not valid if it is given in exchange for benefits the employee is already entitled to; the employer must offer extra benefits or money to the employee to support the validity of any settlement.

Finally, the regulations specify that settlement agreements may not affect the EEOC's power to enforce the ADEA or interfere with the right of an employee to file a charge or participate in an investigation. Under this provision, the EEOC has taken the position that an employee may challenge the knowing and voluntary nature of a settlement agreement he or she has signed and continue to reap the benefits provided for in the challenged agreement. This seems unfair to me. If an employee believes a settlement agreement is invalid, he or she should not have it both ways by being allowed to continue to benefit from the provisions of the challenged agreement. Be that as it may, the EEOC's regulations should not continue to be suspended for this reason. Problems of this sort can be resolved on a case-by-case basis in the courts.

III. The ADEA Should Not Be Amended To Require Prior EEOC Approval Of All Settlements And Releases.

Current legislative initiatives on this issue are framed as a suspension or repeal of EEOC's regulations. But this is not really what is going on. It is clear under current law that ADEA settlements do not require prior EEOC approval. Under the guise of repealing EEOC regulations, however, certain groups are actually seeking to amend the ADEA to change established law on this issue.

Indeed, shortly after Congress enacted its temporary suspension of the EEOC's regulations, the American Association of Retired Persons ("AARP") filed a brief with the United States Court of Appeals for the Third Circuit (copy attached) in which it characterized the action of Congress as "recent and unequivocal expressions of congressional intent that the ADEA does not authorize the unsupervised release of ADEA rights." Brief at 4. AARP then argued that the uniform holding of every court on this issue should be overruled because "[i]n suspending the EEOC's rule, Congress effectively rejected the reasoning of those cases upon which the rule is premised." id. at 10 n. 4. Thus, having failed to convince the courts that prior EEOC approval is required of every settlement under the ADEA, groups like AARP are now essentially asking the Congress to amend the statute on this point.

CELC and the Chamber believe such an amendment would be unwise and would hurt both employers and employees alike. Such an amendment would impose a new layer of bureaucracy on the settlement process. Employers and employees would no longer be permitted to sit down and settle age discrimination claims, even in cases where both parties are represented by counsel. Instead, all such claims and proposed settlements would have to be submitted to the EEOC. No settlement could be consummated and no money would change hands until the EEOC gave its approval.

This would substantially alter the current settlement process. Such settlements may take place in many different contexts, but one typical context is when an employer is closing its plant or reducing its workforce. In this situation, many employers will offer laid-off employees a substantial extra severance bonus, perhaps as much as $25,000, $50,000 or more, in exchange for a settlement and release of all claims arising out of the termination of their employment.

Such settlements substantially benefit the employer. Generally, a financially strapped company that is laying off employees can ill afford the expense and distraction of protracted litigation that may result from layoffs and plant closings.

These settlements also substantially benefit the employees who are laid off. Usually, these settlements put a substantial sum of money in the employee's pocket when he or she needs it most -- during the critical period following a layoff when the employee must find a new job.

The EEOC's experience confirms that most laid-off employees view the availability of an immediate settlement as a plus, rather than a minus. In an article in the Labor Law Journal, EEOC Commissioner Silberman recounted that:

> In February, 1986, the Commission reviewed for possible litigation a number of claims involving ADEA releases. In two claims presenting similar facts, the companies were implementing reductions in force and offering employees severance pay in exchange for releases of potential ADEA and other claims. The consideration offered was substantial: an employee with 30 years of service who earned $25,000 a year, for instance, would receive $28,846. The releases were written in plain English, recommended consulting an attorney, and provided time for careful consideration.
>
> Our investigation revealed that approximately 50 persons executed releases, but only four wished to challenge them. Under a rule that unsupervised releases are per se impermissible, the 46 individuals in these two cases who decided that they would prefer to receive the consideration rather than file a charge would have been deprived of that option.

R. Silberman and C. Bolick, The EEOC's Proposed Rule on Releases of Claims under the ADEA, 37 Labor Law Journal 195, 200 (April 1986).

Amending the ADEA to prohibit settlements that do not have prior EEOC approval would put an end to this mutually beneficial process. Employers will no longer offer generous severance packages in exchange for a settlement and release if the agreement in question is not valid because it lacks EEOC approval. Instead, most employers can be expected to pay employees the minimum they are legally entitled to and to save their remaining funds to be used for litigating or settling charges of discrimination that are actually filed.

Employees will be significantly hurt by such an amendment. Instead of getting money up front when they really need it, employees will have to file a charge and await the results of an EEOC investigation and the Commission's approval of a settlement. Recently, the EEOC has come under attack by Congress for difficulties it has experienced in handling its caseload. Chairman Hawkins has stated that "recent egregious mismanagement of over 900 ADEA cases by the Commission has caused public outrage and raises serious concerns about the EEOC's ability to effectively enforce the laws." Cong. Rec. at E563 (daily ed. Mar. 8, 1988). The Commission will find it even more difficult to stay on top of its substantial backlog if it has to carry out the additional assignment of reviewing and giving its approval to every single one of the tens of thousands of age discrimination settlements that are reached in this country every year. Moreover, with such a daunting work load, the process of obtaining Commission approval of settlements can be expected to take years. Both this Committee and groups who claim to represent older Americans should ask themselves if it really makes sense to require every ADEA settlement to be reviewed and approved by the EEOC before any money changes hands, given the EEOC's current backlog and lack of staff and resources.

Moreover, requiring the EEOC to review and approve every ADEA settlement will not provide significant additional protection to older workers. The EEOC's current regulations already authorize employees to file a charge when they are dissatisfied with the knowing or voluntary nature of a settlement agreement. The validity of the agreement is thereafter subject to careful scrutiny by both the EEOC and the courts. Again, the Committee must ask itself whether it makes sense for the EEOC to have to review *every* settlement agreement under the ADEA, or whether the Commission should focus instead on settlement agreements where the employee has a complaint. While the former approach may offer greater opportunities for the Runyans and Hands of this world -- sophisticated people who know exactly what they are doing when they sign a release, the latter approach seems better calculated to protect employees who really need to rely on the Commission.

Finally, one cannot help but be disturbed by the paternalistic approach embodied in the suggested amendment to the ADEA. Under Title VII it is clear that minorities and women can settle discrimination claims without prior EEOC approval, provided that such settlements are knowing and voluntary. *See*, *e.g.*, *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). Nor is prior government approval generally required of settlements in the personal injury context. However, by passing an amendment requiring such approval under the ADEA, Congress would be indicating that older employees, virtually alone among potential plaintiffs, must have prior government approval before they can settle a claim. There is absolutely no basis for such misguided paternalism which can only hurt both employers and employees alike.

CELC and the Chamber respectfully request that the Congress reject any attempt to extend the current suspension of the challenged EEOC regulation and any other attempt to amend the ADEA to require prior EEOC approval of knowing and voluntary settlements.

Senator **Metzenbaum**. Let me ask you, does it bother you at all as a lawyer—and I'm a lawyer as well—that Mr. Graham had to opt for a position to quit, and to take early retirement? Because to choose an alternative route would have meant that whatever he might have recovered would have been eaten up by legal fees. And do you think that Congress ought to consider providing—maybe we do now provide—for the allowance of legal fees to bring an action? [Conferring with staff]. I am told that the law does provide for the payment, but the question is what do you have in out-of-pocket expenses? The cost of paying the lawyer until you win is very expensive, and if you lose, then you really are hurting very badly.

Do you think there is some inequity there for the individual?

Mr. **Vaughn**. I think in terms of the ADEA's provisions, Senator Metzenbaum, which you focus on recovery of attorneys' fees, they are quite fair, because they permit the recovery of attorneys' fees to the plaintiff in one of these cases if he or she is a prevailing party, and they permit the recovery of costs. And I think as a practical matter, there are many plaintiff's lawyers who in effect finance these cases; they don't require payments en route until a final decision, and so the employee is really not out of pocket.

So I think Mr. Graham's concern, quite frankly—he mentioned it, but I was surprised he mentioned it, because if he thought he had a meritorious case, he would have recovered attorneys' fees.

Senator **Metzenbaum**. Let me quote from a recent Fortune magazine article entitled, "The Down Side of Downsizing."

In discussing the productivity risks associated with corporate cost-cutting, the author states as follows:

> Above all, say the managers who have been through the downsizing mill, the people being let go must be treated with respect, kindness and even solicitude. That sounds idealistic, but in practice it is less a matter of human decency than of hard-nosed pragmatism, because the employees who remain will be watching closely to see how the laid-off are treated.

How are waivers helpful in promoting the kind of good will referred to in Fortune magazine?

Mr. **Vaughn**. I think, Senator Metzenbaum, because waivers are applicable where employees are receiving enhanced benefits, that the fact of the enhanced benefits is very important and services all of the purposes that you referred to in the quotation. And I would agree with the quotation totally. I agree that employees who are involved in a termination are going through a traumatic period, and they ought to be treated with sensitivity. And I think the fact that Mr. Graham was offered $200,000 in extra benefits demonstrates that.

I don't believe that requesting a waiver takes away from that.

It is very important to note that an employee can sign a waiver—Mr. Graham could and did sign that waiver—and he still has the right to go to the EEOC and file a charge claiming that the waiver was not knowing and not voluntary and did not otherwise comply with the EEOC's regulation. And if he doesn't receive satisfaction from the EEOC, he has the right to go into Federal court.

So he has the right to obtain a review and a judgment, first by the EEOC, and then by the court. And if either of them are of the opinion that the release has not been knowing and voluntary, it will be set aside. So he's got more than adequate protections.

Senator **Metzenbaum**. Well, I can appreciate the fact that the enhanced benefits redound to the employee's benefit. How does the execution of the waiver affect that process? Why do we need it? And how do you explain the fact that so many thousands of employees have been retired by major corporations in this country, and they haven't seen fit to use waivers?

Mr. **Vaughn**. Senator Metzenbaum, I think that as there is more and more litigation on issues such as this, employers become more wary. I think they are less inclined to give enhanced benefits without releases or waivers in exchange. I think their lawyers advise or caution them to be careful, and that being careful would involve getting a release if you are going to give added benefits.

So I think the effect is that there will be fewer employers doing what apparently the employers you referred to in your statement have done in the past.

Senator **Metzenbaum**. As I stated earlier, this is a quote from our survey—one top corporate official stated, "Waivers could undermine the atmosphere of good will that is essential to such a voluntary program." He explained that the waiver request could discourage participation by arousing needless suspicion among employees.

Would you challenge that statement?

Mr. **Vaughn**. I think if it is improperly handled, that statement could be correct, and I think it depends on how it is handled, and I would never counsel a client to handle it in a way that would cause needless unrest and confusion and uncertainty.

I think the first witness who testified, that in that case the situation was not handled to perfection.

Senator **Metzenbaum**. Mr. Vaughn, thank you very much for your testimony.

I think the witnesses have been particularly helpful today. I think the testimony has been very balanced. I appreciate your being with us, Ms. Clauss, and with your past experience, your testimony is particularly incisive and helpful.

At this point, I would like to insert in the record written materials describing voluntary exit incentive programs offered by a number of companies in recent years. These materials, submitted to subcommittee staff by IBM, AT&T, Union Carbide, and Polaroid, are examples of exit incentive programs that do not seek any waiver of employee rights.

[The material referred to and additional material supplied for the record follows:]

AT&T

Katherine A. Hagen
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Director and Attorney

Suite 1000
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202 457-3838

May 12, 1988

Mr. James J. Brudney
Chief Counsel -
Senate Labor Subcommittee
608 Senate Hart Office Building
Washington, DC 20510-6300

Dear Jim:

Enclosed is the AT&T Transition Protection Payment Plan, which was made available to management employees in salary grades 1 through 11 as long as they were not designated as "Retained Employees," during specified periods of time in 1986 and 1987. Each department had a different time period so that the force reduction under this plan occurred gradually. There was no waiver requirement under this plan.

Additional information is forthcoming, but this may be a start for you. I hope to get the rest to you tomorrow.

Sincerely,

Katherine

dgp

Enclosure

I hereby adopt the amendments to the AT&T Transition Protection Payment Plan (TPPP) which are reflected in the attached copy of TPPP. Each amendment shall be deemed effective on the date of its initial implementation, and any actions previously taken in conformance therewith are hereby ratified.

I hereby authorize the Senior Vice President - Personnel of AT&T to make amendments to the Transition Protection Payment Plan as he/she deems appropriate.

Charles Marshall

Charles Marshall
Vice - Chairman of AT&T

Date: 5/19/87

AT&T TRANSITION PROTECTION PAYMENT PLAN
AND SUMMARY PLAN DESCRIPTION

OVERVIEW

The AT&T Transition Protection Payment Plan ("The Plan") is designed to provide specified separation payments to management employees who have been designated as other than a "Retained Employee" pursuant to the terms of the AT&T Force Management Guidelines and who, in accordance with the Force Management Guidelines, either (i) elect to terminate their employment or (ii) are designated by the Company for involuntary termination. The AT&T Force Management Guidelines are not a part of and are not subject to the Plan. Any determinations made under or pursuant to the AT&T Force Management Guidelines shall not be subject to the provisions of or any review under this Plan.

TYPE OF PLAN

Under the definitions of the Employee Retirement Income Security Act of 1974 (ERISA), the Plan is classified as a welfare plan for purposes of providing a specified post-employment payment.

PARTICIPATION

An employee is a participant in the Plan if he/she (i) is a regular full or part-time management employee with at least six months net credited service (including an employee who is receiving disability benefits or is on a leave of absence with guaranteed reinstatement rights) in salary grade 1 through 11[1] (or equivalent salary grades or positions), (ii) is not designated as a "Retained Employee" under the AT&T Force Management Guidelines, and (iii) during a time period specified by the Company, either (a) elects to terminate employment voluntarily in accordance with the AT&T Force Management Guidelines or (b) is involuntarily terminated from employment by the Company in accordance with the AT&T Force Management Guidelines.

Individuals who are designated as "Retained Employees" under the AT&T Force Management Guidelines shall not be participants in this Plan nor eligible for any payments hereunder. Employees who terminate employment or whose employment is terminated by the Company for any other reason not associated with nor under the terms of the AT&T Force Management Guidelines shall not be participants in the Plan nor eligible for any payments hereunder.

The [title of officer] of [name of company], with the concurrence of the Senior Vice President-Personnel of AT&T,

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[1] Management employees in salary grade 11 who are participants in the 1984 AT&T Stock Option Plan are not eligible to participate in or receive any payment under this Plan.

determines if and when the Plan is to be applied and to what positions and groups of employees the Plan is to be applied.

ELIGIBILITY

In order to be eligible to receive benefits under the Plan, an employee must:

- be a participant in the Plan;
- irrevocably offer, on or before the date specified in the particular Plan implementation, to voluntarily sever his/her employment with the Company or be designated by the Company for involuntary termination in accordance with the AT&T Force Management Guidelines; and
- actually terminate his/her employment on the date(s) required by the particular Plan implementation or on a date acceptable to the Company.

Limitation on Total Number of Participants. If more than the maximum acceptable number of participants (as determined by the Company) offer to sever their employment voluntarily, selection of employees who may voluntarily terminate employment and receive Plan benefits will be based on descending order of net credited service.

Refusal of Another Position. No participant shall be eligible for a payment under this Plan if he/she has declined to accept a lateral, local position (same salary grade and same general geographic area as the employee's current position) offered to him/her during the staffing process under the AT&T Force Management Guidelines and has been designated for termination by the Company. For purposes of this provision, a local position is one which would not qualify an employee for the Company's relocation program.

PLAN BENEFITS

Amount of Severance Pay. A Plan participant who is separated under the provisions of the AT&T Force Management Guidelines, either voluntarily or pursuant to a Company designation of involuntary termination, will be provided with a separation payment in an amount equal to the participant's annual covered compensation (as defined below); provided, however, for employees with less than 20 years of net credited service, the amount of the severance payment shall be reduced 5% for each full or partial year of net credited service less than 20 years. For any participant who has between 6 months and 2 years of net credited service, the severance payment will equal 5% of annual covered compensation. For example, if a participant has 20 or more years of net credited service and his/her annual covered compensation is $50,000, the separation payment would be $50,000; for a participant with 12 years of net credited service and covered compensation of $50,000 a year, the separation payment would be $30,000, computed by subtracting from $50,000 the product of 40% (i.e. 5% multiplied by 8 years) and $50,000.

Covered Compensation. For purposes of the Plan, annual covered compensation shall mean those items as set forth and defined as follows:

- Base Salary - annual basic rate of pay in effect as of the date of the employee's termination;

- Special Merit Award ("SMA") - the largest of any lump sum payment made within the 12 month period immediately preceding the date of termination and granted to an employee for purposes of recognizing and rewarding such individual's performance for the year preceding the date the SMA is granted;

- Area Differential - a specific amount, annualized and as in effect on the date of the employee's termination, expressed in dollars or as a percentage of base salary payable to employees working in defined work locations in order to recognize relatively higher living costs in such locations.

For employees on an incentive compensation program (e.g., marketing incentive compensation), annual covered compensation shall equal the amount of the base salary, special merit award, area differentials and incentive compensation payments actually paid in the 12 month period ending on the last day of the second month preceding the declaration of surplus relating to any such employee.

Except for those items listed and described above, no other payment or item of income or compensation shall be included in the term "annual covered compensation" under the Plan. For part-time management employees, the current annual basic wage rate will be pro-rated on the basis of the relationship of actual hours worked to normal full-time service.

Net Credited Service. For purposes of calculating the Plan payment, net credited service is a participant's term of employment, which includes the current period of a participant's continuous service as well as any periods of prior service that have been credited under the Company's bridging of service rules.

CALCULATION OF LUMP SUM SEPARATION PAY

Net Credited Service		% Annual Compensation	Equivalent Remaining (Related t Payback-Se "Forfeitur section)
20 or more years		100	12
At least 19 years	- Less than 20 years	95	11
18	19	90	11
17	18	85	10
16	17	80	10
15	16	75	9
14	15	70	8
13	14	65	8
12	13	60	7
11	12	55	7
10	11	50	6
9	10	45	5
8	9	40	5
7	8	35	4
6	7	30	4
5	6	25	3
4	5	20	2
3	4	15	2
2	3	10	1
6 months	2	5	1

Tax Withholding. The amount of any separation payment is subject to the withholding of federal, state and local taxes at the time of payment and will be reported on IRS form W-2. However, an employee's total entitlement to separation pay will be subject to FICA (social security taxes) and FUTA (unemployment taxes) as of the date the Company notifies an employee that his/her offer to voluntarily terminate has been accepted or as of the date the Company notifies an employee that he/she will be involuntarily terminated.

Entitlement to Payment. Any amounts payable under the Plan relate solely to a participant's termination from employment and are not related to a participant's prior service with AT&T or any subsidiary or affiliated company. A participant's right to receive any payments under the Plan does not mature until such participant has terminated employment either voluntarily or involuntarily in accordance with the terms of the Plan and the AT&T Force Management Guidelines.

Payments Upon Death, Disability or Leave of Absence. If a participant has died prior to the specified termination date, no payments will be made under the Plan to the participant or the participant's heirs or estate. If a participant dies after terminating service but before all payments are made, any remaining payments will be made to the participant's spouse or, if the participant leaves no surviving spouse, the participant's estate in a single lump sum as soon as practicable after the participant's death.

If an employee is on disability benefits or a leave of absence with a right to guaranteed reinstatement at the time of becoming a participant in the Plan or prior to terminating employment (either voluntarily or involuntarily) under the AT&T Force Management Guidelines, any payments under the Plan to such a participant shall be computed and paid as follows:

> Employees on a leave of absence with guaranteed right of reinstatement: No payment will be payable until after the employee's employment is formally terminated in accordance with either the employee's election or the designation of termination by the Company under the AT&T Force Management Guidelines.

> Employees on disability benefits: No payment under this Plan will be payable until the employee's employment is formally terminated in accordance with either the employee's election or the designation of termination by the Company under the AT&T Force Management Guidelines, and any separation payment otherwise payable under this Plan shall be reduced by the full amount of any disability benefits paid,

under any disability plan maintained by the Company, subsequent to the date of the employee's termination from employment or the date the employee's employment would have terminated if he/she had not been disabled, and no separation payment shall be paid until the full amount of the offset can be computed (e.g. after all disability payments have been made).

METHOD OF PAYMENT

Voluntary Separation. A Plan participant who irrevocably elects to terminate employment voluntarily will, at his/her election at the time of the election to terminate employment and subject to approval of the form of payment by the Company, be required to irrevocably select and will be paid in accordance with one of the following methods of payment:

1. Lump sum payment paid in full on or about the first day of the second month following the month of termination.
2. For terminations which occur in 1986, lump sum payment with payment deferred until on or about January 30, 1987.

3. Lump sum payment with payment deferred until on or about January 30, 1988 or in the case of any eligible termination which takes place in 1988 or thereafter, January 30 of the calendar year following the year of termination.
4. Stream of payments - equal monthly payments in an amount equal to the participant's monthly basic salary over a period beginning as of the first day of the second month following the month of termination and lasting until the participant's severance payment is exhausted.
5. Stream of payments (only for employees who are entitled to a payment equal to one year's annual covered compensation) - equal monthly payments over a period of 24 months beginning as of the first day of the second month following the month of termination.

Company Designated Termination. A Plan participant who is terminated involuntarily in accordance with the Company's designation will be paid in a single lump sum payment on or about the participant's separation date (or as soon thereafter as is practicable). Such participant is not eligible to elect any of the other methods of payment offered to participants who elect to separate employment voluntarily.

FORFEITURE

If a participant is re-employed by AT&T or any affiliated or subsidiary company within the same control group of companies as AT&T, or any other company that participates in the same pension plan or plans as AT&T or with respect to which AT&T has an interchange agreement by which the participant is covered at the time of reemployment, any remaining separation payments will cease with the date of reemployment. If a participant who has received a lump sum payment is reemployed within the period covered by such lump sum payment (up to one year), the individual will repay to [name of company] the equivalent of the remaining months' payments. For example, if the participant is granted a year's separation pay and receives it in a lump sum and is re-employed after 9 months, the equivalent of 3 months' separation pay must be repaid to the [name of company]. (See last column of "Calculation" chart on page 7).

Notwithstanding any other provision of the Plan, if, as determined by the [name of committee], participant fails to continue to fulfill his/her legal obligations not to disclose Company proprietary information, any remaining unpaid separation payments shall automatically cease and be forfeited.

MEDICAL, LIFE INSURANCE, OTHER BENEFITS

Certain other benefits which an employee is normally eligible to receive as an active employee of the Company shall be continued under the terms and for the period as specified below:

- Medical Expense Plan
  - For employees with at least five years term of employment - Company will pay for coverage for 6 months after month in which employee terminates and employee may continue coverage for an additional 6 months by paying group premium for coverage;
  - For employees with at least one year but less than five years term of employment - Company will pay for coverage for 3 months after month in which employee terminates and employee may continue coverage for an additional 9 months by paying group premium for coverage;
  - For employees with at least 6 months but less than 1 year term of employment - employee may continue coverage for up to 12 months after month in which employee terminates by paying group premium for coverage.

- Dental Expense Plan
  - Employee may continue plan coverage for up to 3 months after month in which employee terminates by paying group premium.

- Basic Group Life Insurance
  - Coverage will continue, at Company expense, for 6 months after month in which employee terminates.

- Supplemental Group Life
  - Employee may continue plan coverage for up to 6 months after month in which employee terminates by paying group premium.

- Dependent Group Life
  - Employee may continue plan coverage for up to 3 months after month in which employee terminates by paying group premium.

- (Please note that, effective January 1, 1987, certain of the rules regarding an employee's right to continue, at his/her own expense, medical or dental coverage may be changed in accordance with the provisions of the federal Consolidated Budget Reconciliation Act of 1986. Affected employees will be informed of such changes if and when they become applicable.)

Other than as extended, as set forth above, either at Company or employee expense, all coverages cease at the end of the month of the employee's termination. Notwithstanding the above provisions for extension of certain group medical, dental or life insurance coverages, any such coverages will automatically terminate upon an individual's becoming eligible for group coverage under another plan of any other employer or other organization or upon the failure of an individual to pay a required premium.

Extension of coverage for individuals who retire on a service pension under an AT&T pension plan shall be in accordance with the provisions which normally apply to service pensioners.

The provisions regarding medical, dental and life insurance coverages set forth above are descriptive only and are not part of nor subject to any provisions of this Plan, including any rights of claim and review. For a description of the administration of or rights of participants under any of the Company's medical, dental or life insurance programs, please consult the booklets describing such plans which have previously been distributed to participants.

PLAN ADMINISTRATION

American Telephone and Telegraph Company is the plan administrator of the Plan. AT&T has delegated administrative authority and responsibility to the AT&T Employees' Benefit Committee and to each of its subsidiary companies which are covered by the Plan for the employees of each such subsidiary. For employees of [name of subsidiary], [name of subsidiary, address, tel. no.] solely administers this Plan through the [officer of subsidiary]. The Senior Vice President - Personnel of AT&T is the named fiduciary of the Plan and the [officer of subsidiary] is the named fiduciary who, with the concurrence of the AT&T Senior Vice President - Personnel, makes determinations concerning when and to what positions or groups separation payment(s) should be made in [name of subsidiary]. The AT&T Employees' Benefit Committee is the named fiduciary which is to afford a full and fair review of any denial of a claim by the [officer or the Benefits Review Committee of subsidiary] for separation payments under the terms of the Plan. All determinations of the AT&T Employees' Benefit Committee are conclusive and are not subject to further review. Any named fiduciary or any fiduciary designated by a named fiduciary may delegate any responsibilities hereunder.

PLAN RECORDS

The Plan is identified by the following number under Internal Revenue Service rules:

#____13-4924710__________ assigned by the IRS.
#_______535______________ assigned by AT&T.

PLAN CONTINUANCE AND AMENDMENTS

AT&T reserves the right to make changes in the Plan from time to time or to terminate the Plan at any time. Such changes or termination of the Plan will not affect a participant's right to any benefit which he/she may have previously become entitled to receive.

PLAN DOCUMENTS

This document is both the Summary Plan Description and the official Plan document which regulates the operation of the Plan. Plan participants are entitled to examine, without charge, Plan documents and the Annual Report, if any, as required by Federal law. These documents are available for review at [location]. If participants are unable to examine these documents there, they should write to the Secretary of the Benefits Review Committee at the above address, specifying the documents to be examined and the Company work location at which they wish to examine them. Copies of such documents will be made available for examination at the work location within 10 days of the date the request is received.

At any time, participants may request copies of the Plan documents by writing to: [name or title and address]. They will be charged a reasonable fee for copies of the documents requested, unless Federal law requires that the documents be furnished without charge.

COST OF PLAN

The entire cost of the benefits under the Plan is paid for by the Company.

PAYMENT OF BENEFITS

. Payments are paid directly by the Company.

LEGAL SERVICE

Process can be served on the Plan or the Company, as Plan Administrator, by directing such legal service to [name or title and address].

ASSIGNMENT OF BENEFITS

Assignment or alienation of any benefits provided by the Plan will not be permitted or recognized except as otherwise authorized by law. This means that, except as required by law, benefits provided under the Plan may not be sold, assigned or otherwise transferred by a participant.

BENEFIT CLAIM AND APPEAL PROCEDURES

CLAIM PROCEDURE

Any employee who is a participant in the Plan, or a person duly authorized by a participant, may file a claim in writing for benefits under this Plan if the participant believes he/she has been treated unfairly under the Plan. Such claim may only relate to a matter under the Plan and not any matter under the AT&T Force Management Guidelines or any other Company policy, practice or guidelines.

The written claim should be sent to [name of committee at subsidiary or title of officer and address]. The written claim should be sent within 60 days of the date of the alleged unfair treatment, or occurrence of other facts giving rise to the claim.

If the claim is denied, in whole or in part, the claimant will receive written notice from [name of committee or title of officer], including the specific reason for the denial, within 90 days of the date the claim was received.

In some cases, more than 90 days may be needed to make a decision. In such cases, the claimant will be notified in writing, within the initial 90-day period, of the reason more time is needed. An additional 90 days may be taken to make the decision if the claimant is sent such a notice. The extension notice will show the date by which the decision will be sent.

APPEAL PROCEDURE

The Appeal Procedure which follows gives the rules for appealing a denied claim.

A claimant may use this procedure if:

- no reply at all is received by the claimant within 90 days after filing the claim;
- a notice has extended the time an additional 90 days and no reply is received within 180 days after filing the claim; or
- written denial of the claim for benefits or other matters is received within the proper time limit and the claimant wishes to appeal the written denial.

If a claim for benefits is denied, in whole or in part, either expressly or by virtue of the participant not having received a reply, the participant, or other duly authorized person, may appeal this denial in writing within 60 days after the denial is or should have been received. Written request for review of any denied claim should be sent directly to the AT&T Employees' Benefit Committee at 550 Madison Avenue, New York, New York 10022 (Rm. 1023), Attn. Secretary, AT&T Employees' Benefit Committee, which serves as the final review committee under the Plan for all participants. Unless the AT&T Employees' Benefit Committee sends notice in writing that the claim is a special case needing more time, the AT&T Employees' Benefit Committee must conduct a review and decide on the appeal of the denied claim within 60 days after receipt of the written request for review. In special cases, requiring more time to make a decision, the AT&T Employees' Benefit Committee will send notice in writing that there will be a delay and give the reasons for the delay. In such cases, the Review Committee may have 60 days more, a total of 120 days, to make its decision.

If the claimant sends a written request for review of a denied claim, the claimant has the right to:

1. review pertinent Plan documents which may be obtained by following the procedures described in this Summary under "Plan Documents", and
2. send to the AT&T Employees' Benefit Committee, a written statement of the issues and any other documents in support of the claim for benefits or other matter under review.

The AT&T Employees' Benefit Committee's decision shall be given the claimant in writing within 60 days or, if extended, 120 days, and shall include specific reasons for the decision. If the AT&T Employees' Benefit Committee does not give its decision on review within the appropriate time span, the claimant may consider the claim denied.

Please note that the Plan requires that a participant pursue all the claim and appeal rights described above before seeking any other legal recourse regarding claims for benefits.

RIGHTS OF A PLAN PARTICIPANT

All employees eligible for benefits under this Plan are plan participants. As a participant in the Plan you are entitled to certain rights and protections under ERISA. ERISA provides that all Plan participants shall be entitled to:

1. Examine, without charge, at [location] and copies of all documents filed by the Plan with the U.S. Department of Labor, such as detailed annual reports.
2. Obtain copies of all Plan documents and other Plan information upon request to the [title, address]. A reasonable fee or charge may be imposed for such copies.

In addition to creating rights for Plan participants, ERISA imposes duties upon the people who are responsible for the operation of employee benefits plans. The people who operate this Plan, called "fiduciaries" of the Plan, have a duty to do so prudently and in the interest of all Plan participants. No one, including a participant's employer or union or any other person may fire or otherwise discriminate against a participant in any way for the purpose of preventing a participant from obtaining a benefit or exercising rights under ERISA. If any claim for a Plan benefit is denied, in whole or in part, the person whose claim was denied must receive a written explanation of the reasons for the denial.

Such a person has the right to have [name of committee or title of officer] and/or the AT&T Employees' Benefit Committee review and reconsider that claim (see Section entitled "Benefit Claim and Appeal Procedures").

Under ERISA, there are steps to take to enforce the above rights. For instance, if materials from the Plan are requested but not received within 30 days, the person making the request may file suit in a federal court. In such cases, the court may require the Company to provide the materials and pay that person up to $100 a day until the materials are received, unless they were not sent because of reasons beyond the control of the company. Anyone whose claim for benefits is denied after final review or ignored, in whole or in part, may file suit in a state or federal court. Anyone who is discriminated against for asserting rights under the Plan may seek assistance from the U.S. Department of Labor or may file suit in a federal court, but an action relating to a claim for benefits may not be filed prior to exhausting the claim and appeal procedure under the Plan. The court will decide who will pay court costs and legal fees. If that person is successful, the court may order the party that was sued to pay these costs and fees. If that person loses, the court may order him or her to pay these costs and fees if, for example, it finds that the claim was frivolous.

Anyone who has questions about the Plan should contact the [title, location]. Anyone who has questions about this statement of participants' rights, or about rights under ERISA, should contact the nearest Area Office of the U.S. Labor-Management Services Administration, Department of Labor.

AT&T

Katherine A. Hagen

5/13/88

MEMO TO: Jim Brudney

FROM: Katherine Hagen

Jim:

Enclosed is additional material on AT&T's TPPP as promised.

KAH

Room 89-1000
1120 20th Street, N.W.
Washington, DC 20036
202 457-3838

EMPLOYEE COMMUNICATION PACKAGE

"ELIGIBLE" STATUS
PACKAGE CONTENTS

- Employment Contract Disclaimer
- Executive Summary of Force Management Program (FMP)
- Transition Protection Payment Plan and Summary Plan Description (SPD)
- FMP Questions and Answers
- Transition Protection Payment Plan Election Form
- FMP Declaration Timeline
- Overview of Benefits Associated with the Force Management Program
  - Benefits Associated with Force Management Program
  - COBRA Benefits
- Pension Information and Calculation Worksheet
- Transition Leave of Absence Description and Election Form
- Career Transition Program (CTP)
  - Description
  - Application Form
  - Directory of Coordinators
- Resource Directory
- Jobs Access Hotline Brochure
- Receipt of Documents Verification Form

EMPLOYMENT CONTRACT DISCLAIMER

The documents in this package are not a contract of employment and are not intended to create, nor should they be construed to create, any contractual rights, either expressed or implied, between the Company and its employees. The employment relationship is by mutual consent and employees have the right at any time to terminate their employment for any reason. The Company reserves the right to terminate employees on the same basis, unless the terms of an applicable collective bargaining agreement provide otherwise, regardless of any statements, written or oral, by the Company, or any of its employees or representatives which may seem to be to the contrary. The practices and procedures described in the document in this package are guides for managers and may be changed, altered, modified or deleted at any time, with or without prior notice by the Company.

MANAGEMENT SUMMARY OF THE FORCE MANAGEMENT PROGRAM

(This summary provides a brief overview of the Force Management Program, the program's purpose and some of the steps required in its implementation. A more complete description is available in the Transition Protection Payment Plan and answers to specific questions are available in the questions and answers provided in the employee communication package. Employees with additional questions should contact their supervisor or the regional personnel department).

The Force Management Program was developed to address the business problem of force imbalances resulting from conditions such as elimination or consolidation of jobs, economic reductions, skill mismatches or changes in the market. This program applies only to management employees. Force reductions among the occupational ranks are handled in the manner described by contracts with the unions.

The Force Management Program gives an organization's managers the flexibility they need to reduce the number of management employees when necessary. Although the program was developed by the personnel department, the senior managers of a department are responsible for: deciding when or if the program should be implemented, managing the implementation, and explaining to their management-level subordinates the program's ramifications, both for the organization and individual employees.

The program was designed to achieve the following objectives:

- — Retain employees who possess the critical skills, knowledge and performance levels necessary to meet current and future business needs;
- — Ensure fair and consistent treatment of all employees;
- — Maintain a positive public image in the local, financial and labor markets;
- — Ensure a successful transition for managers who leave the business by providing professional career counseling and assistance.

An organization implementing the Force Management Program must accomplish several major tasks. They include:

- — Conduct an organizational design and work assessment study to determine how the organization should be structured;
- — Determine what skills are required by the new organization;
- — Rank employees into bands. Some employees, generally around 20 to 30 percent of the new organization, are placed in the "protected" band. These employees, who are regarded as having critical skills needed by the organization in the future, will be excluded from participation in the program;
- — Submit the design for the new organization, the criteria used for banding employees and lists of employees in each band to a review committee made up of representatives from Personnel and Legal;
- — Offer and explain the financial incentives to leave the company to employees designated as eligible for the program;

- Identify those employees who must be involuntarily separated from the company if too few employees volunteer to leave. These employees are ranked in the lowest band or bands. They will be asked to leave, starting with the lowest, band, in inverse order of seniority.
- Establish a time frame within which these activities must be accomplished.

Each organization's management determines the functions, skills and number of employees needed to accomplish the business tasks with which it is charged. It decides which employees will fill the jobs available in the new organization — that includes the placement of both protected and qualified eligible employees who choose to remain with the company. It also determines which employees will be involuntarily separated should that be necessary.

Employees who volunteer to leave the company will receive one years salary if they have been with the company for 20 full years or more. That amount will be reduced by 5 percent for each year of service less than 20. Employees who volunteer can receive their separation payment as a lump sum two months after separation, deferred for one year, or as a stream of payments spread over 12 months or, if they have 20 or more years of service, 24 months.

Employees who involuntarily leave the company under this program will receive a lump sum separation payment calculated in the same manner.

The company will provide a special outplacement program — the Career Transition Program — for employees who leave AT&T under the Force Management Program whether voluntarily or involuntarily.

FORCE MANAGEMENT PROGRAM

QUESTIONS AND ANSWERS
"ELIGIBLE" STATUS

These Questions and Answers are provided for employees who have been designated as "Eligible" for the implementation of the Force Management Program.

ELIGIBILITY FOR THE FORCE MANAGEMENT PROGRAM

1. Q. Who will be eligible to participate in this program?

   A. This program will be implemented by departments within AT&T. Affected employees in management salary grades 1 through 11 (with the exception of salary grade 11 managers who participate in the 1984 stock option plan or the equivalent salary grades in selected departments) will participate in the program.

2. Q. What criteria was used to determine the band I was placed in?

   A. In general, the company's future need for the talents and skills of each employee was used to determine banding. The most recent performance appraisals were also used.

3. Q. Is there a limit on the number of employees who can be placed in each band?

   A. No. The number of management employees placed in each band as well as the number of employees designated "protected" is up to the management of each affected department. Generally, the number of employees assigned to the protected band(s) should be in the range of 20 to 30 percent of the new organization.

4. Q. Will Equal Employment Opportunity (EEO) considerations affect the bandings?

   A. The company is committed to ensuring equal opportunity; it will fully adhere to its policy of not considering an employee's race, color, sex, age, national origin, religion, martial status or sexual orientation in making determinations under the FMP.

5. Q. Doesn't the company owe all of its employees the opportunity to leave with special payments, particularly those who have performed well in the past?

A. Employees do not earn entitlement to voluntary severance payments. This plan was developed to address a problem — force imbalance. It is a business decision to deal with a business situation, just as giving each employee his or her current assignment was a business decision. This program is not meant to be a reward or a punishment.

6. Q. Will the band I'm placed in for this program be the one I carry forever?

A. No. If the program were implemented again, employees in the department would be ranked again. You might move up or down, depending on your performance and the needs of the business at the time.

7. Q. If an employees is banded as "eligible" but doesn't volunteer to leave during the voluntary phase of the program, can that person volunteer later?

A. No. The voluntary phase of the program is open for a designated number of days. Eligible individuals who fail to volunteer during that phase will not be permitted to volunteer during the involuntary phase of the program.

8. Q. When will this program be offered again?

A. The decision to offer the FMP is made by individual departments on a needs-of-the-business basis.

9. Q. Will this program involve employees posted overseas?

A. This program is being implemented on a department-by-department basis. Consequently, some management employees posted overseas may be involved.

10. Q. If an employee volunteers to leave the company under this program, will his or her offer automatically be accepted?

A. No. The company reserves the right to review all offers. For example, if too many people volunteer to leave, the company could reject some offers. In this case, the decision as to which offers will be accepted will be based on net credited service.

STAFFING OPPORTUNITIES WITHIN AT&T

11. Q. What are my options if the involuntary phase is invoked and I am formally declared at risk of losing my job?

A. Employees declared 'at risk' have the option of seeking other job opportunities within AT&T for which they are qualified. By completing the Staffing Preference Form, the employee works with the Region Personnel Staffing organization to identify job opportunities.

If they are not staffed by their department's force imbalance resolution date, they may have to leave the company.

12. Q. Can an employee declared at risk of losing his or her job be considered for a non-management position?

A. Generally, no. Such considerations will be in accordance with the provisions of the applicable collective bargaining agreements or personnel practices.

13. Q. Will downgrades within management be offered as an alternative to separation?

A. Generally, downgrades will not be available. However, an employee may be considered for lower salary grade management positions if they are available, the employee is qualified, business conditions warrant, and it is according to the normal staffing procedures of the line of business with the vacancy.

14. Q. If an employee is separated as a result of this force downsizing and subsequently rehired by an AT&T company, will their service be bridged?

A. The rules on bridging are complex and vary according to the time spent away from the company and other factors. Consequently, each case would be considered separately.

15. Q. Does a management employee who leaves the company under the Force Management Plan have any right to be recalled if there are future openings in AT&T?

A. No. Employees who terminate their employment under the FMP do not have recall rights. They can reapply for employment with AT&T through the AT&T regional employment office. If openings occur for which they are qualified, consideration will be given provided their application for employment is current.

16. Q. If an employee leaves the company under this program and is re-employed by an AT&T company within the period covered by the separation payment, do they have to repay the company?

A. Yes, they would have to repay the company the equivalent of any remaining months within the payment coverage period. For example, if someone were granted a year's separation pay and were rehired after 7 months, he or she would be required to repay the equivalent of 5 months separation pay.

17. Q. Could an employee be engaged as a consultant to the company without forfeiting the separation payments?

A. If such a circumstance did arise, employees engaged as consultants would not have to return their separation payments.

18. Q. If I am hired by a former Bell Operating Company or other company with which there is an agreement for interchange of benefit obligations (such as the Mandatory Portability Agreement) within the period covered by my separation payment and I am covered by such an agreement, do I have to repay the company?

A. Yes, you would have to repay the company the equivalent of any remaining months of your separation payment. However, if you are not covered by an agreement for interchange of benefit obligations, no repayment is required.

19. Q. If an "eligible" employee is being considered for a job vacancy which requires relocation, is relocation assistance available?

A. If an eligible employee accepts a position within AT&T that requires relocation, he/she will be offered all the benefits of the management relocation plan in effect at the time the job offer is accepted.

20. Q. If I am offered a lateral position or a promotion by AT&T that does not require relocation, what happens if I refuse the offer?

A. If you refuse to accept an offer of a lateral position or promotion that does not require relocation, you will not receive separation benefits under the Plan. Your designated separation date will remain the same.

21. Q. If I terminate my employment under the Force Management Plan and go to work for a company other than AT&T or a company covered by an agreement for the interchange of benefits, will my separation payment or pension be affected?

A. No, neither your separation payment nor your pension will be affected.

22. Q. If I have already indicated my intention to retire on a certain date, would I be eligible for a separation payment?

A. Not necessarily. However, if your requested retirement date falls within the implementation period of your departments Force Management Program, as an eligible employee, terminating under the Plan, you will receive a separation payment.

PAYMENTS

23. Q. What formula will be used to determine separation payments?

A. Employees with 20 years or more of net credited service will receive a separation payment in an amount equal to the participants annual covered compensation (as defined on Page 5 of the TPPP Summary Plan Description). For employees with less than 20 years of net credited service, the amount shall be reduced 5% for each full or partial year of net credited service less than 20 years.

24. Q. What is included in annual covered compensation?

A. For this program, annual covered compensation includes base salary, special merit award and area differential (if applicable) actually paid in the 12 months prior to the separation date.

For employees on an incentive compensation program (e.g., marketing incentive compensation) annual compensation equals the amount of the base salary, special merit award and incentive compensation payments actually paid in the 12-month period ending on the last day of the second month preceding the declaration of a force imbalance relating to any such employee. For example, if a force imbalance is declared on October 15th, the salary period would be from September 1st of the previous year to August 31st of this year.

25. Q If I leave the company under this program, am I eligible to receive an AT&T Performance Award (formerly known as Team Award?)

A. Yes, employees separated due to force reduction/downsizing/facility closing are eligible if the minimum eligibility requirements are met, (i.e., 3 full months as an AT&T management employee, active on payroll, during the performance year and satisfactory performance.) The award will be made in March following the performance year and will be prorated based on the number of months in the performance year that the employee was active on payroll in a management position.

26. Q. If I am service pension eligible and separate from the company through the Force Management Program, will I receive a separation payment?

A. Yes.

27. Q. May I elect to take a separation payment and stay on the job past the company-designated separation date?

A. No. your last day on the payroll must be not later than the company-designated separation date.

28. Q. Can I receive a separation payment but leave AT&T prior to the company-designated separation date?

A. Yes. Your last day on the payroll may be on or before the company-designated separation date, needs of the business permitting.

29. Q. If I leave before the final off-payroll date, will I be paid through the last date of the offer?

A. No. You will be paid through your last day on the payroll.

30. Q. What happens if I become disabled before leaving the company through this offer or I am currently receiving benefits under the sickness and accident disability benefit plan (SADBP)?

A. That depends on your individual circumstances as described below. In many respects, you will be treated like your fellow employees who are not disabled. In other words, you will be placed into a band and may be offered an opportunity to voluntarily leave the company with a separation payment or you may be involuntarily separated.

- If you volunteer to leave the company

  o while actively at work but then become disabled before you leave, you will leave on the date specified in accordance with the Force Management Program whether you are within the first seven days of absence of have commenced eligibility for sickness disability benefits under the Sickness and Disability Benefits Plan (SADBP) as of the separation date. You cannot revoke your election once it has been made.

- o while disabled and receiving sickness or accident disability benefits under SADBP or are within the first seven days of sickness at the time you voluntarily elect to leave the company and would not be service pension eligible as of the specified separation date, your service will end on the specified date. This means that you would be entitled to the separation payment and the medical and other insurances as described in the Force Management Program instead of sickness or accident disability benefits and the other benefits to which you would have been entitled if you continued to receive benefits under SADBP. You also will no longer be eligible for the Long Term Disability Plan, death benefit coverage, any automatic survivor annuity coverage or a disability pension under the AT&T Management Pension Plan (AT&T MPP) after your separation date. However, if you meet the eligibility criteria for a deferred vested pension, you may be eligible for pre-retirement survivor annuity coverage. (See the answer to question 45).

- o while disabled and receiving sickness or accident disability benefits under SADBP or you are within the first seven days of sickness and would be service pension eligible as of your specified off-payroll date, you will leave on that date. However, you will not be considered to have left the service of the company for reasons of disability (since you voluntarily left) and, therefore, any early retirement discounts under AT&T MPP will apply. Your service pension will be effective the day after your separation, and you will be eligible for the same benefits as any other retiree (e.g., death benefit coverage, insurances, etc.)

- If you are subject to an involuntary separation

- o while disabled and receiving sickness disability benefits under SADBP or are within the first seven days of sickness on the specified separation date, you will not actually be separated on the specified date but will be separated at either the cessation of your disability or the end of the 52-week eligibility period for benefits as described in the SADBP, whichever comes earlier.

  During the period you are receiving sickness disability benefits, you will remain on the active roll. You will continue to participate in the various benefit plans as if you were not subject to involuntary separation. You will retain your eligibility to be considered under the Long Term Disability Plan (LTD) if you remain disabled beyond the end of the 52-week period of sickness disability benefits. However, the separation payment under the Force Management Program will be based on your service as of the specified separation date, that is the date you would have left the company had you not been disabled.

The separation payment will not be paid until after you have finished receiving disability benefits of any kind from the company, including LTD. The separation payment will be offset by the amount of disability benefit payments you received after the specified separation date. If your disability benefits exceed the separation payments, you will not be eligible for or be paid any such separation payments.

If you remain disabled at the time you actually are separated from the company (after the expiration of SADBP benefits) and if you otherwise qualify for a service pension or a disability pension, that pension will begin the day after you actually leave the company and, as provided under the AT&T MPP, will not be discounted for early retirement.

During the period you are receiving accident disability benefits under SADBP, you cannot be considered for involuntary termination under the Force Management Program. However, employees on accident disability benefits who return to work will be treated in accordance with the force conditions that exist as of the time of their turn.

31. Q. If I am on a leave of absence (other than a departmental leave of 30 days or less), will I be involuntarily separated?

A. If you are on a leave of absence with a guarantee of reinstatement (i.e., an anticipated disability or care of a newborn child (CNC) leave of absence), you will be treated like your fellow employees who are not on a leave of absence. You will be placed into a band and may be offered an opportunity to voluntarily leave the company with a separation payment. If you elect to do so, you would go off the payroll no later than the same date as the other employees who are not on a leave of absence. If you are designated for involuntary separation, you will be separated at the same time as other participants in the program and receive a separation payment.

32. Q. What happens to the separation allowance if I die before the payment is made?

A. If you die after separation from employment and prior to the payment of the lump sum, the amount shall be payable, in a lump sum, to your estate. If you die before you leave the payroll, no separation payment will be made. Normal entitlements would apply in that case.

33. Q. If I leave the company with a separation payment, will I receive pay in lieu of remaining vacation and management personal days?

33. A. Cont'd
You will be paid for any allowed unused Vacation Days, Management Personal Days and Floating Holidays in the current year and any approved carry-over vacation days.

34. Q. If I have submitted my Election Form to voluntarily leave the company, can I change my mind?

A. No. As a plan participant, your decision is final at the time you submitted the Election Form to voluntarily terminate your employment with the company.

35. Q. Can separation payments be deposited by electronic funds transfer?

A. No. The payments will be mailed to your home address on file.

36. Q. How will my separation payment be made if I volunteer to leave?

A. If you volunteer to leave the company, your separation payment can be paid in one of the following ways:

- Lump sum payment in full on or about the first day of the second month following the month of termination;
- Lump sum payment deferred until January 30 of the calendar year following the year of termination, in the case of any eligible termination which takes place in 1988 or thereafter;
- Stream of payments up to 12 months, or---for those with 20 years or more of service---24 months.

37. Q. How will separation payments be made if I am involuntarily separated from the company through this program?

A. You will receive a lump sum payment on or about your last day on payroll or as soon thereafter as practicable.

38. Q. What effect will receiving a lump sum payment, either this year or next year, have on my taxes?

A. AT&T cannot provide tax advice. However, it is strongly suggested that you consult a tax specialist on your individual tax matters.

39. Q. Will credit union, United Way and other miscellaneous deductions be taken from my separation payments?

A. No.

40. Q. Will my separation payment be subject to withholding of income taxes?

A. Your separation payment is subject to the withholding of Federal, State and Local taxes and reported on IRS Form W-2.

41. Q. Will Social Security taxes be deducted from my separation allowance?

A. Separation payments may be subject to Social Security (FICA) taxes depending upon the amount of your earnings for the year in which you were confirmed or notified of your termination date. Social Security taxes will be reported on IRS Form W-2.

EFFECTS OF SEPARATION ON PENSIONS AND SOCIAL SECURITY BENEFITS

42. Q. Will the early retirement discounts provided for in the AT&T Management Pension Plan be reduced or eliminated if I leave the company under this plan?

A. No. If you are separated, the early retirement discounts will not be reduced or eliminated.

43. Q. What effect does separation from employment under the AT&T Transition Protection Payment Plan have on my pension?

A. If you are eligible for an immediate service pension, whether discounted or non-discounted, under the AT&T Management Pension Plan (AT&T MPP) as of the company-designated separation date, referred to as the "applicable date", your separation under the AT&T Transition Protection Payment Plan will not have effect on your eligibility for, or determination of, your service pension. You qualify for a service pension, if you leave employment after meeting at least one of the following requirements:

AGE	NET CREDITED SERVICE
any age	30 years
50	25 years
55	20 years
65 or over	10 years

If you are within one year of the age and/or term of employment requirements for service pension eligibility under the AT&T MPP as of the "applicable date" (remember, "applicable date" means company-designated separation date) you will be able to attain that eligibility by completing the required time on a "Transition Leave of Absence".

If you meet the following condition, you will be placed on a Transition Leave of Absence on the day following the "applicable date":

- o You are within one year of the age and/or term of employment requirements for service pension eligibility under the AT&T MPP as of the "applicable date" and separated under the AT&T Transition Protection Payment Plan.

43. A. Cont'd
You will remain on a Transition Leave of Absence until the earlier of the following occurs:

(a). Eligibility for an immediate service pension is attained (but in no case more than one year, i.e., the one-year anniversary date of the "applicable date"), or

(b) You are hired by either an AT&T company or a former Bell System company in which you are eligible for portability of service under an agreement for interchange of benefit obligations (See Questions 14 and 15).

44. Q. How will a Transition Leave of Absence affect the calculation of my service pension amount?

A. The duration of your Transition Leave of Absence will be added to your age and service at the "applicable date" only for determining eligibility to a service pension under the AT&T MPP. The benefit calculation will be based on your age and service and plan formula in effect as the "applicable date." The period of the Transition Leave of Absence will not be considered as net credited service in the calculation of your benefit. Any early retirement discount will be calculated based on your age as of the "applicable date".

45. Q. Will the fact that someone left voluntarily or involuntary have any effect on whether the person is eligible for a Transition Leave of Absence?

A. No. Employees who meet the condition in question 44 will be placed on a Transition Leave of Absence on the day following the applicable date, whether separation is voluntary or involuntary.

46. Q. What if I'm on sickness or disability leave as of the company-designated separation date?

A. If you voluntarily elect to leave the company under the AT&T Transition Protection Payment Plan and are disabled, your eligibility to a Transition Leave of Absence would be the same as for other employees.

If you are involuntarily separated under the AT&T Transition Protection Payment Plan and your are on leave because of sickness disability on the "applicable date", then you may still be eligible for a Transition Leave of Absence. The condition described in question 43 must be met as of the "applicable date." However, if during your sickness disability you attain eligibility for an immediate service pension, you will not be eligible for a Transition Leave of Absence. Assuming you met the earlier condition as of the "applicable date" and are not eligible for an immediate service pension at the end of your sickness disability, then you will be placed on a Transition Leave of Absence for a period of time not to exceed 12 months minus the number of months on sickness disability since the "applicable date."

46. A. Cont'd
You will remain on the transition leave until such time as eligibility for an immediate service pension is attained.

47. Q. If I am on a Transition Leave of Absence and become disabled, am I entitled to sickness disability benefits?

A. No.

48. Q. Please explain how Transition Leave of Absence would work if I am 49 years old and have 24 years of service on the "applicable date?"

A. If you are exactly 49 years old with exactly 24 years of service as of the "applicable date", then you are within exactly one year of the age and service requirements for eligibility to an immediate service pension.

You will than be placed on a Transition Leave of Absence for one year. At the end of one year, you will begin receiving a service pension which is the amount accrued as of the "applicable date" under the pension formula in effect at that time. Your service pension will be based on 24 years of service, and the early retirement discount of 1/2 percent per month for each month prior to age 55 will be determined based on your age at he "applicable date" (i.e., age 49), not at your age at the end of your Transition Leave of Absence.

49. Q. What if I'm 49 and a half with 25 years of service on the "applicable date?"

A. If you are 49 and a half with 25 years of service on the "applicable date" you are within one year of the age requirement for service pension eligibility. You have already obtained the service requirement.

In this case, your Transition Leave of Absence will be six months, i.e., the time at which you would attain eligibility for an immediate service pension at age 50.

At this time (i.e., age 50) you will begin receiving a service pension based on your age and service at the "applicable date" (i.e., 49 and a half with 25 years of service). The early retirement discount will be for 66 months, the number of months between age 49 and a half and 55.

50. Q. If I return to work at AT&T or a former Bell System Company where my service is recognized, and I have not attained service pension eligibility on my Transition Leave of Absence, will those months that I have been on leave count towards eligibility for a service pension in my new job?

A. No.

51. Q. What happens if, while on my Transition Leave of Absence, I go to work for a company that DOES NOT recognize my AT&T or Bell System service?

A. You will be eligible to continue your Transition Leave of Absence until you are eligible for a service pension from AT&T.

52. Q. What benefits am I entitled to during a Transition Leave of Absence?

A. For the duration of the Transition Leave of Absence, the following benefit coverages will apply:

- o Death Benefit under the AT&T MPP. If there is a qualified beneficiary.
- o Automatic Survivor Annuity coverage under the AT&T MPP to which you are entitled as of the "applicable date."
- o Group Life Insurance basic coverage will be provided by the company. You may continue any supplemental coverage if you pay the monthly contributions.
- o Dependent Group Life Insurance may be continued if you pay the monthly contributions.
- o Dental Insurance will be provided by the Company.
- o Medical Expense Plan or alternate choice coverage plan will be provided on the same basis as for active employees.
- o Vision Care Plan coverage ends at the end of the month following the month in which your Transition Leave of Absence begins.
- o Savings Plan distributions will be handled as described in question 70, as if you were service pension eligible on the "applicable date."
- o ESOP distribution will be handled as described in question 75.

When you attain service pension eligibility, you will receive the post-retirement benefits afforded other-retirees.

53. Q. What date will be used in determining my age and service criteria for service pensions or a deferred vested pension if I leave the company?

A. Age and service criteria will be determined as of the last day your are on the payroll.

54. Q. If I leave the company now through this plan and am eligible for a deferred vested pension, but die before I begin collecting my deferred vested pension, are there any survivor benefits for my spouse under the pension plan?

A. In general, if you die prior to commencement of your deferred vested pension, your spouse will receive a pension payable on the 65th anniversary of your birthday if you have not waived the pre-retirement survivor annuity option, which is offered under the pension plan. If you leave the company, you will be provided with information on this.

55. Q. Will the separation payment be considered as wages that could lower my Social Security benefits?

A. No. If you are separated and are pension eligible, based on age and service, the separation payment will not lower your Social Security benefits.

56. Q. Can I collect Social Security while I am collecting separation payments?

A. Yes, if you are at least 62 (the earliest age you can collect Social Security).

To calculate your benefits, Social Security will look at your age, years of work and your pay up to the date you leave. However, if you go to work elsewhere, your earnings will make you ineligible for Social Security. Your separation payments would nevertheless remain the same.

EFFECTS OF SEPARATION ON RELOCATION PAYMENTS

57. Q. If I am separated, will my relocation payments continue?

A. No. All relocation payments will cease. However, employees who have ongoing relocation differentials will be reimbursed for the total remaining commitments for mortgage interest differential, real estate tax or rent differential.

Payment will be made in a lump sum at the present dollar value of the remaining commitment. Only the three components will be included in the lump sum payment. Any differentials for CILOR (Computation in Lieu of Relocation) State or Local income taxes are not eligible for payment/payout after the date of separation.

58. Q. If I am separated in the same year that I relocate, will I have to repay my relocation expense reimbursement?

A. If you are separated in the same year that you have been relocated, you will not have to repay relocation expense reimbursements.

59.Q. If I am separated in the same year that I relocated, will the taxes due be calculated and paid to me (grossed-up)?

A. Yes.

60. Q. If I am in the process of relocating and have not completed my move and am separated from the company through this program, what will be the company position as to reimbursement and conclusion of my move?

A. Each of these situations will be considered on an individual basis. You will need to discuss your personal situation with your Relocation Counselor.

BENEFITS AND OTHER RELATED MATTERS

61. Q. What happens to my medical insurance and the other insurance plans if I leave the company?

A. You will have the opportunity to continue via COBRA.

62. Q. Must I continue to call HealthCheck after separation?

A. Yes. To be assured of getting the maximum allowable benefits under the Medical Expense Plan, you must follow the HealthCheck procedures.

63. Q. I'm taking classes under the tuition assistance plan. How will that be handled?

A. An employee who terminates employment under the Force Management Program who through participation in the Tuition Assistance Program has received reimbursement for tuition and expenses from AT&T or where the educational institution has directly billed the company for education tuition and expenses on behalf of the employee.

UNEMPLOYMENT COMPENSATION

64. Q. Am I entitled to file a claim for unemployment benefits?

A. Yes, every separated employee has the right to file for benefits.

65. Q. Will I be eligible to collect unemployment benefits?

A. The company will not contest claims for unemployment compensation when the employee was involuntarily separated. In the case of claims by employees who voluntarily separated, in response to a State's Request, the company will provide the facts surrounding the employee's reason for leaving, including whether the employee was `At Risk' of involuntary separation.

SAVINGS PLAN AND ESOP

66. Q. If I terminate under the provisions of TPPP, and I am service pension eligible, what options do I have regarding my balance in the Savings Plan for Salaried Employees (SPSE)?

A. All balances in your account, including company contributions, will be vested upon your termination under TPPP with a service pension. Regarding the distribution of your account, you may elect one of the following options:

- To receive the total value of your account in one payment.
- To defer your distribution until any time up to age 70 1/2, subject to your life expectancy.
- To receive annual installment payments up to a maximum of 20, subject to your life expectancy.
- To purchase an annuity with your balance in the Guaranteed Interest Fund (if any) and to receive the remainder of your account in one payment.

The method of payment for these options is normally made in cash (check). However, individuals with account balances in AT&T shares or the Diversified Telephone Portfolio may elect to receive the value of these balances in shares (stock certificates).

Prior to electing an option, it is suggested that you refer to the section of the SPSE Prospectus titled: "Federal Income and Estate Tax Effect of Employee Allotments, Employing Company contributions and Withdrawals Under Present Law".

To elect one of the above options, contact the Transaction Processing Center on 1-800-952-0077.

67. Q. If I am service pension eligible and have chosen to defer receipt of my account, may I change my mind?

A. Yes, you may change your mind and elect to begin receiving distributions from your account by contacting the TPC. However, you must begin receiving a distribution in the year you attain age 70 1/2.

SAVINGS PLAN: SPSE AND ESOP (Cont'd)

68. Q. When I am retired and I have deferred receipt of my savings plan balance, can I still change my balance from one investment option to another?

A. Yes. you may do so by calling the Transaction Processing Center on 1-800-952-0077. You are governed by the same rules as active participants. (See Section 7 of the Prospectus for the Savings Plan for Salaried Employees).

69. Q. Will the value of my account change if I leave my money in the savings plan after I retire?

A. Account values will fluctuate with market conditions depending on your investment options. Your investments will be subject to the same risks as any active participant's. No additional allotments can be added. However, if a portion of your account is invested in the Diversified Telephone Portfolio, earnings on your balance in the Diversified Telephone Portfolio are added to the AT&T shares investment option.

70. Q. If I terminate under the provisions of TPPP, and I am not eligible for a service pension, what options do I have regarding my balance in the Savings Plan for Salaried Employees (SPSE)?

A. All balances in your account, including company contributions, will be vested upon termination. Regarding the distribution of your account, you may elect one of the following options:

- To receive the total value of your account in one payment.
- To purchase an annuity with your balance in the Guaranteed Interest Fund (if any) and to receive the remainder of your account in one payment.

The method of payment for these options is normally made in cash (check). However, individuals with account balances in AT&T shares or the Diversified Telephone Portfolio may elect to receive the value of those balances in shares (stock certificates).

Prior to electing an option, it is suggested that you refer to the section of the SPSE Prospectus titled: "Federal Income and Estate Tax Effect of Employee Allotments, Employing Company Contributions and Withdrawals Under Present Law".

To elect one of the above options, contact the Transaction Processing Center on 1-800-952-0077.

SAVINGS PLAN: SPSE AND ESOP (Cont'd)

71. Q. When do contributions to the savings plan end?

A. Your allotments (and matching company contributions) will be made through your final regular wage payment. Contributions are credited to your SPSE account the month in which you receive your paycheck.

Note, payment in lieu of vacation, team incentive payments made after your termination, and any payments made under TPPP are not eligible compensation under the provisions of the SPSE; therefore, no allotments will be taken from these payments.

72. Q. How will my SPSE account be valued?

A. The Savings Plan provides for a Plan payout upon termination of service that is usually valued as of the month of termination. However, in order to be valued or to make a deferral election (service pension eligible only) effective as of the end of the month of termination, the following three events must take place:

- The participant must call the TPC during the month that termination is effective and request the payout or deferral. Confirmation of the request will be sent to the participant following the telephone call.

- The participant must sign and return the Confirmation Form by the 15th of the month following the month of termination.

- The payroll office must report the termination to American Transtech by the 15th of the month following the month of termination.

When one or more of these three events is delayed or does not occur, the effective date of valuation for a Plan payout or a deferral may be in a later month then the month in which the participant terminated services.

In general, there is a maximum period of 90 days in which a Plan payout may be pending. An administrative process is in place to handle situations in which one of the three previously mentioned events does not occur.

For participants with account balances over $3,500, failure to contact the TPC within the 90-day period following the month of termination will result in transfer of all Plan balances to the Guaranteed Interest Fund, without the right of withdrawal until age 65 or death. Participants who are age 65 or older, or who have account balances of $3,500 or less, will be paid out in cash with federal tax withheld following the 90-day period.

Remember, when you terminate service, you must call the TPC, and sign and return the Confirmation Form to American Transtech.

SAVINGS PLAN: SPSE AND ESOP (Cont'd)

73. Q. I have pre-tax (401k) deductions taken from my pay. What happens to that money?

A. Your balance in the pre-tax (401k) portion of the Plan will be distributed in the same manner as described in response to question 63.

74. Q. When can I expect to receive my account distribution?

A. Distribution checks are mailed within 45 days after the end of the valuation month. For example, if your distribution is valued as of October 31, your distribution check should be mailed by December 15th.

Distribution of stock certificates, if applicable, are generally mailed within one week following the mailing of the distribution checks.

75. Q. How will my ESOP account be distributed?

A. You will receive shares of AT&T stock plus a check for any fractional shares remaining. If the value of your ESOP account is $3,500 or less, distribution will automatically be made in February following the year of termination.

If the value of your ESOP account is over $3,500, distribution of your account cannot be made without your written consent. American Transtech will mail you an ESOP distribution authorization form with an explanatory letter in January following the year of termination. The letter specifies the dates that your signed form must be received by American Transtech in order to effect a February or later distribution.

CAREER TRANSITION PROGRAM

76. Q. What is the Career Transition Program (CTP)

A. The Career Transition Program provides a choice of workshops designed to assist you in pursuing career opportunities outside of AT&T. It is designed to help you:

- determine your strengths,
- identify a satisfactory objective to best utilize your abilities and interest, and fulfill personal goals,
- learn marketing techniques to obtain a new job or start your own business,
- plan the steps and follow-up approaches to achieve new personal objectives.

CAREER TRANSITION PROGRAM (Cont'd)

76. A. Cont'd
CTP provides a practical means to help you plan for the future. Under CTP, you may participate in one of the following workshops:

- Outplacement (Re-Employment)
- Entrepreneurial (Self-Employment)

77.	Q.	Am I eligible to participate in CTP?
	A.	You are eligible to participate if you are within an affected work group and are going to voluntarily or involuntarily leave the company under the Force Management Guidelines.
78.	Q.	If I attend a CTP workshop, will the company find employment for me?
	A.	No. The objective of CTP is to assist you in pursuing career objectives. Neither the professional counseling firm nor the company guarantees subsequent re-employment.
79.	Q.	What expenses will be covered by the company if I participate in CTP?
	A.	The company will pay all fees, as well as your travel, lodging and meal expenses, if any, in connection with attendance at CTP functions.
80.	Q.	How do I register to participate in CTP?
	A.	Your Employee Communication Package contains a CTP form which is to be completed and returned as indicated.
81.	Q.	If I register to participate in CTP, how will I be notified of when to attend?
	A.	You will be notified by your Personnel Organization.
82.	Q.	If I do not elect to participate in the Career Transition Program, will I receive payment in lieu of the service?
	A.	No. Employees are not eligible for payment in lieu of this service.
83.	Q.	Will the company provide me with references?
	A.	AT&T will confirm that you worked for the company, the number of years you worked, and your title.
84.	Q.	If I do not elect to participate in the Career Transition Program when I leave the payroll, can I participate at a later date?
	A.	You can participate in one of the CTP workshops for up to 6 months after your off-roll date by submitting the CTP Election Form.

FMP:010 (2/88)

AT&T Transition Protection Payment Plan

Election Form

I have read and am familiar with the AT&T Transition Protection Payment Plan and Summary Plan Description (the Plan). I fully understand both the benefits and the terms and conditions of the Plan. I am aware that:

1. Any offer I may make to terminate employment with AT&T (including any subsidiary or affiliate of AT&T), with Plan benefits, is VOLUNTARY AND IRREVOCABLE.

2. If the Company accepts my offer, I must leave the payroll by ________________________. [to be filled in by the Company]

3. If the number of employees who offer to leave the payroll voluntarily exceeds the maximum acceptable number, as determined by the Company, the Company has the right to limit the number of acceptances to the maximum acceptable number of employees. In such case, acceptance of employees' offers to leave the payroll voluntarily and to receive benefits will be given to employees in descending order of their net credited service.

4. If my offer to leave the payroll voluntarily is accepted by the Company, I understand that my separation payment is subject to forfeiture if:

   (a) I am later reemployed by AT&T;

   (b) I am later reemployed by any affiliated or subsidiary company that is within the same control group of companies as is AT&T;

   (c) I am later reemployed by any other company that participates in the same pension plan or plans as AT&T, or with respect to which AT&T has a interchange agreement by which I am covered at the time of my reemployment;

   (d) I violate the Company's guidelines regarding disclosure of proprietary information.

5. If my offer to leave the payroll voluntarily is accepted by AT&T, I agree that if I am rehired by AT&T, or reemployed by any of the companies described in paragraphs 4(b) or 4(c), within one year of my separation from AT&T, I will forfeit an amount equal to the equivalent remaining month's separation pay to which I am then entitled.

6. If I am involuntarily terminated by AT&T and am rehired by AT&T, or reemployed by any of the companies described in paragraphs 4(b) or 4(c) within one year of my separation from AT&T, I will forfeit an amount equal to the equivalent remaining month's separation pay to which I am then entitled.

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Election Form - Page 3

Name: ______________________________
Social Security No.: ______________________________
Responsibility Code/Organizational Code: ______________________________
Organization: ______________________ Salary Grade: ____________
Work Address and Room No.: ______________________________
Work City/State: ______________________________
Office Telephone No.: ______________________________
Immediate Supervisor: ______________________________

Check one:

[ ] I voluntarily and irrevocably offer to leave the payroll by ____________ [date to be filled in by Company] with AT&T Transition Protection Payment Plan benefits.

[ ] I do not choose to voluntarily leave the payroll.

The following is to be completed by those who voluntarily offer to leave the payroll.

If my offer to leave the payroll voluntarily is accepted by the Company, I irrevocably choose to receive my payment under the AT&T Transition Protection Payment Plan in the following manner: (Check one)

[ ] Lump sum with payment on or about the first day of the second month after the month of separation.

[ ] Lump sum with payment deferred until January 30th of the calendar year following the year of termination.

[ ] Equal monthly payments up to 12 beginning on the first day of the second month following the month of separation.

[ ] 24 equal monthly payments beginning on the first day of the second month following the month of separation. (Available only for employees eligible for one year's salary).

For involuntary separations, the payment will be in a lump sum on or about the participant's separation date, or as soon thereafter as is practicable.

______________________________ ______________________________
Employee's Signature Date

NOTE: All three pages of this election form must be returned to the designated Company official: ______________________________
____

SAMPLE

TIMELINE

ORGANIZATION NAME: ______________________________

GEOGRAPHIC LOCATION(S): __________________________

SALARY GRADE(S): ________________________________

VOLUNTARY OFFER ANNOUNCED	(DATE)
VOLUNTARY OFFER CLOSES	(DATE)
AT RISK PACKAGES DISTRIBUTED	(DATE)
SEPARATION DATE	(DATE)

Management Benefits Associated with Separations Due to Force Reductions

	Service Pension Eligible	Non-Service Pension Eligible
** Medical Expense Plan	Continues for retired employees and eligible dependents.	Service Dependent. (2)
** Dental Expense Plan	Continues at company expense.	EOM + 90 days at individual's expense.
** Vision Care Plan	Last day of month following month of separation.	Last day of month following month of separation.
Group Life Insurance	Paid in full by the company. (1)	EOM + 6 months basic at company's expense.
Supplemental Group Life Insurance	Premiums are deducted from pension check. Terminates at age 65.	EOM + 6 months as group insurance at individual's expense.
Dependent Group Life Insuarance	EOM + 90 days at individual's expense.	EOM + 90 days at individual's expense.
* Savings Plan for Salaried Employees	All savings plan balances, including company contributions, are vested upon termination with a service pension or for reasons of disability. Distribution options are: - receive lump sum payment of account - receive annual installment payments; maximum of 20, subject to employee's life expectancy - defer distribution up to age 70 1/2, subject to life expectancy - purchase an annuity with Guaranteed Interest Fund balance, if any, and receive remainder of account in one payment.	All savings plan balances, including company contributions, are vested upon termination under TPPP. Distribution options are: - receive lump sum payment of account - purchase an annuity with Guaranteed Interest Fund balance, if any, and receive remainder of account in one payment.
Employee Stock Ownership Plan	All ESOP balances are distributed in February following the year of termination.	All ESOP balances are distributed in February following the year of termination.

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EOM = End of Month in which Terminated

(1) Beginning age 66, basic insurance is reduced 10% per year until it reaches 50% of the amount you had at retirement. Age = 70.

(2) NCS = 5 years - 6 months at company expense
- 6 months at individual's expense

= 1 to 5 years - 3 months at company expense

- 9 months at individual's expense

= less than 1 year - 12 months at individual's expense

* All transactions/requests should be handled through the Transaction Processing Center (TPC) at American Transtech on 1-800-952-0077.

** This does not affect any benefits you may have under COBRA. Benefits qualifying for continuation of coverage under COBRA; see "Importance Notice".

** IMPORTANT NOTICE **

TO EMPLOYES WHO LEAVE THE PAYROLL UNDER THE TRANSITION PROTECTION PAYMENT PLAN (TPPP).

The following is an explanation of how your Health Care benefits will continue under TPPP and under the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA).

Under the Transitional Protection Payment Plan, you may be eligible to receive, depending on your net credited service date, Company paid benefits. You will also be eligible for continuation of coverage at the group rate.

In addition, under COBRA, if you and your covered dependents (if any) are not covered under any group health care plan, you may continue AT&T Medical, Dental, and Vision Care coverage without interruption for a total of 18 months after termination of employment. you and your eligible spouse and dependents may have a right to continue health coverage, providing coverage was in effect under the applicable Plan the day before termination of employment. You have an option to choose either:

Choice 1: Medical Expense Plan Coverage only, or
Choice 2: Medical Expense Plan, Dental Expense Plan Coverage and Vision Care Plan Coverage

COBRA in conjunction with TPPP, will enable you to continue the Medical Expense Plan, Dental Expense Plan, and the Vision Care Plan as indicated below. If you do not elect continuation of coverage under COBRA, you are still eligible to receive the Company paid benefits for the period indicated.

Net Credited Service Date		Medical Expense Plan	Dental	Vision
5 yrs. or More of Service				
	COMPANY PAYS	- First 6 months of coverage	- N/A	- 1 Month Company paid coverage
	YOU PAY	- Next 6 months at the group rate - Final 6 months at the COBRA rate*	- 3 months at the group rate - 15 months at the COBRA rate*	- N/A - 17 months at the COBRA rate*
Less than 5 yrs. but more than 1 year of Service				
	COMPANY PAYS	- First 3 months of coverage	- N/A	- 1 Month Company paid coverage
	YOU PAY	- Next 9 months at the group rate - Final 6 months at the COBRA rate*	- 3 months at the group rate - 15 months at the COBRA rate*	- N/A - 17 months at the COBRA rate*

Less than 1 year but more than 6 months of Service			
COMPANY PAYS	- N/A	- N/A	- 1 Month Company paid coverage
YOU PAY	- 12 months at the group rate - 6 months at the COBRA rate*	- 3 months at the group rate - 15 months at the COBRA rate*	- N/A - 17 months at the COBRA rate*

NOTE: The period for company paid coverage and group rate coverage will be considered as part of the total COBRA 18 month period. All rates are subject to change.

N/A = not applicable

* = COBRA Rate plus 2% Administration Fee

Continuation of coverage under COBRA will cease if one or more of the following situations arise:

a) the cost of continued coverage is not paid on or before the due date,
b) you or eligible dependent becomes eligible for Medicare,
c) you or eligible dependent becomes covered under another health care plan;
d) the Plan terminates for all employees.

After the Employee Change Report (ECR) for your separation is approved, processed and reported to Employee Benefits, a notice, a COBRA enrollment form and a rate sheet (see copy attached) to elect continuation of group health care coverage under COBRA will be mailed to your home address. You have 60 days from the date shown on the Specific Notice to elect to continue coverage.

The form should be returned to the appropriate carrier as soon as feasible to ensure coverage without interruption. Specifically, you need to do the following:

1. If you only want the company paid portion (eligibility depends on your net credited service), you should fill out Part 1 of the COBRA form, check the election choice in Part 2, sign, date and return the form to the carrier.

2. If you wish to elect coverage beyond the company paid portion (depending on your net credited service date), complete the entire form and return it to the carrier.

Receipt of the COBRA form by the carrier, will update your benefit eligibility information.

The above does not apply to employees who are service or disability pension eligible since they are eligible for Continuation of Coverage under the Retiree Plans.

COBRA Monthly Rates Effective 1-1-88

Medical Expense Plan	(Management)
Individual	$ 81.30
2-Person	$154.47
Family	$227.62
Class II - Full*	$ 81.30
Class II - Occ Only*	$ 13.73
Dental Expense Plan	
Individual	$ 10.42
2-Person	$ 19.48
Family	$ 29.00
Vision Care Plan	
Individual	$ 1.30
2-Person	$ 2.47
Family	$ 3.64

NOTE: Add 2 percent to monthly rates to cover company administrative costs.

Employees with less than six months service, surviving spouses and those enrolled in an HMO plan should call their benefit office for applicable rates.

*Rate applies to each Class II

PENSION CALCULATION REQUEST

To: AT&T
Employee Benefits Office
4 Wood Hollow Road
Parsippany, NJ 07054
Attn: Manager-Pensions
Fax #: (201) 428-0815

This is my request for a copy of my:

Preliminary Pension Calculation ______________________
(you will receive within 30 days
Deferred Vested Pension Calculation ______________________
(you will receive within 60 days)
Other: ______________________

Name: ______________________

Social Security Number: ______________________

NCS Date: ______________ Date of Birth: ______________

Company worked for before divestiture: ______________________

12/31/86 Company Payroll Office
White Plains _____ Orlando _____ Atlanta _____

Other (please specify) ______________________

My last day on the payroll: ______________
OR
My Pension Effective Date: ______________

I am currently paid from the following Payroll Office:

White Plains _____ Atlanta _____ Other (please specify) _____

Please mail my pension calculation to the following address:

____

____

____

Phone Number: ______________________

Signature: ______________________ Date: ______________

BENEFIT OFFICE USE ONLY:

DATE RECEIVED: ______________ DATE CALCULATED: ______________

DATE MAILED: ______________ INITIALS: ______________

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MANAGEMENT

DETERMINATION OF MONTHLY SERVICE PENSION AMOUNTS

You are service pension eligible if you meet the following requirements:

Age	Net Credited Service (NCS)
Any Age	30 years
50	25 years
55	20 years
65 or over	10 years

By following the attached example and worksheet, you can estimate your monthly pension amount. If you have any questions or would like an estimated service pension calculation, call the appropriate Benefit Information Line shown on Attachment ___. The pension calculation will be based on a last day on payroll date only.

NOTE 1: If you retire before age 55, your pension will be reduced as follows:

Years of Credited Service	Reduction for each month and Partial month of retirement
less than 30	1/2 % a month (6 % a year)
30 or more	1/4 % a month (3 % a year)

NOTE 2: If there is a Survivor Annuity in effect, your pension will be reduced by 10%.

NOTE 3: The dates of 1/1/78 - 6/30/85 represent the 7 1/2 year window which is a set paybase averaging period used to determine pension amounts. Line #13 then takes the salary from 7/1/85 to the date of retirement.

AT&T MANAGEMENT PENSION PLAN

TO ESTIMATE YOUR OWN PENSION UNDER THE AT&T MANAGEMENT PENSION PLAN, FOLLOW THESE INSTRUCTIONS:

	YOUR PERSONAL ESTIMATE	EXAMPLE
* 1. Your Compensation for 1978	$	$ 28,000.00
* 2. Your Compensation for 1979	$	$ 30,000.00
* 3. Your Compensation for 1980	$	$ 32,000.00
* 4. Your Compensation for 1981	$	$ 35,000.00
* 5. Your Compensation for 1982	$	$ 37,000.00
* 6. Your Compensation for 1983	$	$ 39,000.00
* 7. Your Compensation for 1984	$	$ 41,000.00
* 8. Your Compensation 1/1/85 thru 6/30/85	$	$ 26,000.00
* 9. Add your Compensation for the period 1/1/78 thru 6/30/85 as shown in #1 thru #8 above and show here	$	$ 268,000.00
10. Divide the total in #9 above, by 7.5 to determine an average salary for the period	$	$ 35,733.34
11. Enter years and months of service thru 6/30/85		36.5
12. Multiply the average salary in #10 above by your years and months of service thru 6/30/85	$	$1,304,266.91
* 13. Your compensation for 7/1/85 to date of your retirement	$	$ 21,140.00
14. Add #12 above to #13 above	$	$1,325,406.91
15. Multiply #14 above by .016 (1.6%) to determine estimated annual pension	$	$ 21,206.52
16. Divide #15 by 12 to determine estimated monthly pension	$	$ 1,767.21

The amount determined in #16 above, may need to be adjusted for a Survivor Annuity or Early Retirement Discount.

*NOTE: Compensation for Pension Calculations include:

- differentials paid for night tours
- differentials paid for temporary work in a higher classification
- lump sum merit wage payments
- team management incentive compensation awards
- incentive compensation for Marketing Management employees
- special project allowances for assignments which began before 12/1/83
- area differentials

OVERTIME PAY AND ANY OTHER PAYMENTS NOT LISTED ABOVE ARE NOT INCLUDED AS COMPENSATION FOR PENSION PURPOSES.

TRANSITION LEAVE OF ABSENCE

If you are within one year of the age and/or term of employment requirements for service pension eligibility under the AT&T MPP as of the company-designated separation date ("Applicable Date"), you will be able to attain that eligibility by completing the required time on a "Transition Leave of Absence".

You will remain on a Transition Leave of Absence until the earlier of the following occurs:

(a) Eligibility for an immediate service pension is attained (but in no case more than one year, i.e. the one-year anniversary date of the "applicable date"), or

(b) You are hired by either an AT&T company or a former Bell System company in which you are eligible for portability of service under an agreement for interchange of benefit obligations (See Questions 14 and 15 of the Q's and A's).

The duration of your Transition Leave of Absence will be added to your age and service at the "applicable date" only for determining eligibility to a service pension under the AT&T MPP. Your benefit calculation will be based on your age and service and plan formula in effect as of the "applicable date". The period of the Transition Leave of Absence will not be considered as net credited service in the calculation of your benefit. Any early retirement discount will be calculated based on your age as of the "applicable date".

For the duration of your Transition Leave of Absence, the following benefit coverages will apply:

- Death Benefit under the AT&T MPP, if there is a qualified beneficiary.
- Automatic Survivor Annuity coverage under the AT&T MPP to which you are entitled as of the "applicable date".
- Group Life Insurance basic coverage will be provided by the company. You may continue any supplemental coverage if you pay the monthly contributions.
- Dependent Group Life Insurance may be continued if you pay the monthly contributions.
- Dental Insurance will be provided by the Company.
- Medical Expense Plan or alternate choice coverage plan will be provided on the same basis as for active employees.
- Vision Care Plan coverage ends at the end of the month following the month in which your Transition Leave of Absence begins.

FMP: 005 (2/88)

AT&T

APPLICATION FOR A

TRANSITION LEAVE OF ABSENCE

NAME ____________________ SS# ____________________

NCS DATE ____________________ DATE OF BIRTH ____________________

ORGANIZATION ____________________ COMPANY SPECIFIED SEPARATION DATE ____________________

WORK ADDRESS ____

CITY/STATE ____________________ TELEPHONE # ____________________

SERVICE PENSION ELIGIBILITY DATE ____________________

THE TRANSITION LEAVE OF ABSENCE WILL BE CANCELLED EFFECTIVE WITH THE DATE OF (RE) HIRE OR DEATH AND PENSION ENTITLEMENTS WILL BE THOSE AS OF THE DAY BEFORE THE EFFECTIVE DATE OF THE LEAVE.

TRANSITION LEAVE OF ABSENCE IS GRANTED FROM __________ TO __________
(TO BE COMPLETED BY THE BENEFITS DEPARTMENT)

____________________ ____________
Employee's Signature Date

____________________ ____________
Supervisor's Name Telephone Number

____________________ ____________
Supervisor's Signature Date

Return to: Benefits Delivery - Pensions
57A-CC24

CAREER TRANSITION PROGRAM (CTP)

The Career Transition Program (CTP) being offered to you is handled by an outside vendor and provides a choice of one of the following workshops:

- Re-Employment
- Entrepreneurial (Self-Employment)

The following information should be helpful in deciding which workshop is best for you.

The Re-Employment Workshop is designed for employees interested in seeking employment with another company, and provides information and develops skills that will assist employees in achieving this objective. The Re-Employment Workshop covers topics such as dealing with change, personal assessment and career guidance, networking, targeting companies of interest, and penetrating the defenses of targeted companies. Employees participating in this workshop will receive assistance in preparing a resume and cover letter, preparing for interviews, developing a negotiation strategy and accepting an offer, and will receive a typewritten resume with 100 copies.

The Entrepreneurial Workshop is designed for employees interested in self-employment, and provides an overview of what is required to start and run a small business. The following elements are included in the Entrepreneurial Workshop: dealing with change; personal assessment; self-employment analysis and assessment; selecting and defining a business of your own; understanding and developing a business plan; elements and techniques of market analysis; how to develop a marketing plan; how to develop a financial plan including a profit/loss statement, cash flow analysis and break even analysis; how to determine capital requirements and methods of financing; how to organize your business, including choosing the form of ownership and required business records; identifying and discussing the need for professional guidance in the areas of legal, tax and financial considerations, including Small Business Administration assistance.

You may enroll in the workshop of your choice by submitting the CTP application form within the six month period following your termination date. (See attached Directory of Career Transition Coordinators.)

You will be scheduled by either your Personnel Organization or by a consultant from the outside vendor running the workshop. Efforts will be made to schedule convenient times and locations, but you may need to travel in order to be included in the workshop of your choice. There is also a possibility that you may be asked to adapt your schedule somewhat to fit with the workshops scheduled in your area.

3/88

FMP: 009 (3/88)

AT&T
CAREER DECISION WORKSHOP APPLICATION

Name ____________________ Social Security No. __________

Job Title ____________________ Salary Grade ______________

Work Address ____
(Street) (City) (State) (Zip)

Business Tel. No. ______________ Bldg. Loc. Code __________
(Area Code)

Organization/Business Unit ______________________________

Organization Code/Responsibility Code ____________________

1. ___I will enroll in the Career Decision Workshop

   You will be notified of the location and dates of the workshop.

2. ___I will not enroll in the Career Decision Workshop.

______________________ Employee's Signature

______________ Date

RPD/PSO USE ONLY: Course Date: ________________

RETURN THIS FORM TO:

FMP: 009 (3/88)

AT&T
CAREER TRANSITION PROGRAM (CTP)
Workshop Application

Name ______________________ Social Security No. __________

Job Title __________________ Salary Grade ______________

Work Address ____
(Street) (City) (State) (Zip)

Business Tel. No. ________________ Bldg. Loc. Code __________
(Area Code)

Home Address ____
(Street) (City) (State) (Zip)

Home Tel. No. _________________
(Area Code)

Organization/Business Unit ______________________________

Organization Code/Responsibility Code ____________________

Termination Date ____

I have reviewed the provisions of the Career Transition Program and have decided that:

1. ___I will enroll in the Career Transition Program and I select the following workshop:

   ___Outplacement (Re-Employment)
   ___Entrepreneurial (Self-Employment)

   You will be notified of the location and dates of the workshop. Please indicate dates you would be unable to attend:____________________________

2. ___I will not enroll in the Career Transition Program.

______________________________ ______________
Employee's Signature Date

RPD/PSO USE ONLY: Lodging:______________ Course Date:__________
Travel:______________ Hotel:

RETURN THIS FORM TO:

DIRECTORY OF CAREER TRANSITION COORDINATORS

	WORK STATES SERVED	CONTACT
*Technology Systems	All	Judy Hofmeister (201) 771-2571 1 Oak Way Room 2WC106 Berkeley Heights, NJ 07922
Bell Laboratories	All	Libby Marrazzo (201) 564-4331 101 JFK Parkway Room 1L510 Short Hills, NJ 07078
Credit Corporation	All	Royalynn Carruthers 44 Whippany Road Morristown, NJ 07960 (201) 397-3043
Transtech	All	Audrey Ebert 8000 Baymeadows Way Room 5-1-001 Jacksonville, FL 32216 (904) 636-2078

* Includes Federal Systems and Contract Services Organization

DIRECTORY OF CAREER TRANSITION COORDINATORS

	WORK STATES SERVED	CONTACT
EUO Eastern Region	Maine, Vermont, Massachusetts, New York, Connecticut, New Hampehire, Rhode Island, Pennsylvania, New Jersey, Washington, D.C., Virginia, Delaware, Maryland, West Virginia	Karen Hopkins 1 No. Lexington Ave. 10th Floor White Plains, NY 10601 (914) 397-3641
EUO Southern Region	Georgia, Alabama, Florida, Mississippi, N. Carolina, S. Carolina, Tennessee, Kentucky, Louisiana, Kansas, Missouri, Texas, Arkansas, Oklahoma	Florence Richardson 1200 Peachtree St., N.E. Room 10120A Atlanta, GA 30309 (404) 873-7729
EUO Central Region	Illinois, Michigan, Ohio, Indiana, Iowa, Nebraska, Wisconsin, N. Dakota, S. Dakota, Minnesota	Mary Ann Kennedy 1 South Wacker Drive 13th Floor Chicago, IL 60606 (312) 592-6282
EUO Western Region	Colorado, Idaho, New Mexico, Montana, Utah, Wyoming, Arizona, Washington, Oregon, Nevada, California, Alaska, Hawaii	Karen McMahon 5964 W. Las Positas Blvd. Room 1308 Pleasanton, CA 94566 (415) 460-3006
Headquarters	All	Ruthie Carter 295 N. Maple Ave. Room 6132H1 Basking Ridge, NJ 07920 (201) 221-6118
Network Systems	All	Jim Sowell (201) 631-6578 475 Madison Avenue Room 1W-5 Morristown, NJ 07960

3/88

SAMPLE

RESOURCE DIRECTORY

The following information needs to be localized to provide employees with the telephone numbers of:

- Benefits Hotline(s)
- Service Pension Calculation Request Center
- EAP Counselor
- Pre-Decision Counseling Coordinator
- Career Transition Coordinator
- Management Staffing Offices
- RPD Staffing Organization
- Add others as appropriate

1-800-251-JOBS

The right number to call

If you're interested in accessing a list of employers who have registered available job opportunities call 1-800-251-JOBS.

October 12th, 1985 was the "kickoff" date of a unique program that supports your efforts to find the right job, in the right place, at the right price — and to find it quickly.

We have specially trained operators ready to answer your requests for information on who needs who, what and where.

Just call the JOB ACCESS HOTLINE between 8am and 6pm on weekdays Eastern Time and be prepared to give the following information:

Name
Social Security Number
Requested Job Category
(See inside for complete listing)
Salary Requirement
City, State of Preference

The JOB ACCESS HOTLINE Operators will verify your eligibility by social security number — to assure that this valuable information only goes to those for whom it is intended.

A database of opportunities listed by companies across the country will be accessed — and each time you call you will be given a list of several companies that have job openings that meet your requirements.

You can expect to learn:

Company Name
Personnel Contact
Phone Number
Salary Range
Location
Job Category

And, remember, these are companies that have expressed a strong interest in meeting you. You will receive a list of definite openings — and the names of people to contact who are in a position to make decisions.

Don't forget to call. The future is waiting to hear from you.

Help us help each other.

AT&T

Job Categories

Please be prepared to give the JOB ACCESS HOTLINE Operator your requested Job Category, listed in blue.

Under each Job Category are a variety of specializations designed to give you a clear understanding of where your specific skills have been assigned. For example: if you seek a position in Technical Writing, give the JOB ACCESS HOTLINE Operator the Job Category 'General Management' or 'Systems Design/Functions'.

Accounting/Finance

☐ Accounting Equipment Operations
☐ Accounting Systems
☐ Accounts Payable/Receivable
☐ Forecasts and Budgets
☐ Cash Management
☐ Finance — Revenues

Building Services/Trades

☐ Air Conditioning/Heat
☐ Building Maintenance — Custodial
☐ Cafeteria Services
☐ Carpenters
☐ Drivers
☐ Chauffeur
☐ Electrical Maintenance
☐ Furniture and Office Equipment Coordination
☐ Mail Distribution
☐ Mechanical Maintenance
☐ Motor Vehicle
☐ Printing/Reproduction Services
☐ Safety Control
☐ Telecommunications — Planning, Design and Implementation

Customer/Business Service Operations

☐ Credit and Collections
☐ Customer Relations
☐ Outside Representative Services
☐ Operator Services Operations/Administration
☐ Teller Services

Data Processing Operations

☐ Computer Operation
☐ CRT Operation
☐ Bursting/Decollating
☐ Job Control and Scheduling
☐ Keypunch Operations
☐ Magnetic Tape Operations
☐ Data Entry
☐ Teleprocessing

Economic Analysis

☐ Business Cycles
☐ Cost of Service
☐ Decision and Risk Analysis
☐ International Economics
☐ Labor Economics
☐ Macro Economics
☐ Micro Economics
☐ New Product Pricing
☐ Pricing Studies

Engineering

☐ Construction Budgeting/Management
☐ Inventory Management
☐ Technical Forecasting
☐ Interstate Engineering
☐ Building/Real Estate Engineering
☐ Engineering Support
☐ Facilities Engineering
☐ Network Engineering
☐ Switching Engineering

General Management

☐ Administrative Guideline Preparation
☐ Budget Administration/Preparation
☐ Corporate Planning
☐ Methods and Procedures
☐ Policy Formulation
☐ Project Management
☐ Results/Measurements
☐ Supervisory Experience
☐ Staff Experience
☐ Verbal Communication
☐ Written Communication
☐ Technical Writing

Human Resources

☐ Personnel Administration
☐ Employee Benefit Plans
☐ Employee Activities
☐ Equal Employment Activities
☐ Employment
☐ Development
☐ Labor Relations
☐ Management Relations
☐ Safety and Absence Control
☐ Medical

Law and Antitrust Matters

☐ Law and Antitrust
☐ Legal/Litigation Support

Marketing/Sales

☐ Marketing/Sales Administration
☐ Market Research
☐ Sales
☐ Market/Sales Segments
☐ Product Management
☐ Directory Sales and Services
☐ Market Management
☐ Servicing Accounts

Mathematics and Statistics

☐ Analytical Statistics
☐ Applied Mathematics
☐ Applied Statistics
☐ Linear Equations and Matrices
☐ Logistics Analysis
☐ Numerical Analysis
☐ Regression Analysis
☐ Statistical Analysis
☐ Time Series Forecasting
☐ Variance Analysis
☐ Cost Analysis
☐ Distribution Strategies
☐ Estimation Theory
☐ Modeling

Manufacturing

☐ Assembly
☐ Plant Operations

Programming

☐ Applications Programming
☐ Computer Graphics
☐ Data Base Systems
☐ Mini/Micro Computer Programming
☐ On-Line Systems
☐ Remote Batch Processing
☐ Systems Programming Support
☐ Time Share Systems
☐ Programming Languages

1-800-251-JOBS
The right number to call

Weekdays between 8am and 6pm Eastern Time

Public Relations, Media, Advertising and Graphics

☐ Art and Design
☐ Community Relations
☐ Educational Relations
☐ Public Relations Planning/Research
☐ Speech Writing
☐ Audio/Visual Productions
☐ Commercial Art
☐ Exhibit and Display Production
☐ Advertising Planning/Strategy
☐ Copywriting
☐ Media Analysis
☐ Promotional Layout
☐ Art Work
☐ Visual Aids
☐ Illustration
☐ Photography

Purchasing

☐ Vendor Evaluation
☐ Purchasing
☐ Procurement
☐ Contract Negotiations

Rate and Tariff

☐ Rate and Tariff Development
☐ Docket Matters - Federal, Local, State
☐ Tariff Administration
☐ Service Cost Development

Regulatory/Government Relations

☐ FCC Compliance Reviews, Filing, Procedures, Rules
☐ Other Common Carrier - Billing, Tariff
☐ Rate Case Preparation
☐ Actuarial Matters
☐ Civil Defense
☐ Complaint Matters
☐ Construction and License Applications
☐ Government Liaison
☐ Legislation Review
☐ National Security
☐ Political Action Activities
☐ Regulatory Reports
☐ Special Communications Requirements
☐ Witness Activities

Research and Development

☐ Technical
☐ Staff
☐ Design

Real Estate

☐ Office Space Planning
☐ Property Acquisition and Disposal
☐ Real Estate Administration
☐ Site Planning, Evaluation, Selection

Secretarial and Clerical Services

☐ Calculating and Statistical Services
☐ Clerical Duties
☐ Clerical Data Entries
☐ Conference Arrangements
☐ Corporate Secretary Matters
☐ File System Maintenance
☐ Information Retrieval
☐ Receptionist Services
☐ Report Generation - Clerical
☐ Stenographic Services
☐ Travel Arrangements
☐ Typing
☐ Word Processing
☐ Xerography

Security Services/Claims

☐ Physical Security
☐ Claims Investigation

Supplies/Material Logistics

☐ Inventory Records and Controls
☐ Office Supplies Administration
☐ Order and Claims Processing
☐ Shipping, Receiving, Handling Stock
☐ Supplier Procurement
☐ Warehousing
☐ Stock Maintenance

Systems Design/Functions

☐ Common Language
☐ Forms Design
☐ Function Analysis
☐ Position Testing
☐ Task Analysis
☐ Training Material Development
☐ Batch Applications Design
☐ Sub-system Design
☐ Data Administration
☐ System Support (User Problem Solving)
☐ Capacity Planning
☐ Internal Networking/Planning
☐ Hardware Planning
☐ Software Planning
☐ Technical Writing
☐ System Consulting

Systems Hardware

☐ IBM
☐ AT&T Computers
☐ Xerox
☐ Microcomputers

Training Development/Delivery

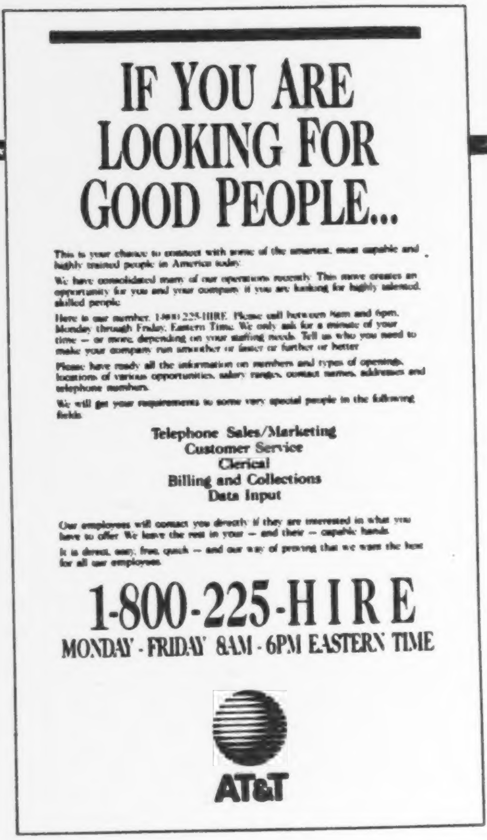
☐ Course Development
☐ Training Administration
☐ Delivery

Technical Services

☐ Access Line Transmission/Outside Plant Facilities
☐ Assignment, Repair, Testing Local and Network
☐ Central Office Facilities
☐ Customer Facility Design and Implementation
☐ Installation and Repair
☐ Outside Plant Construction and Maintenance
☐ Outside Plant Trouble Analysis
☐ Interstate Operations
☐ Network Planning and Design
☐ Minicomputer Maintenance
☐ Microwave Maintenance
☐ Local/Toll Switching Maintenance

This type of advertisement has appeared in newspapers covering the major marketplaces throughout the country.

The employer responses from this message in conjunction with a nationwide direct mail campaign has generated a unique database of job opportunities, designed to assist you in your job search.



IF YOU ARE LOOKING FOR GOOD PEOPLE...

This is your chance to connect with some of the smartest, most capable and highly trained people in America today.

We have consolidated many of our operations recently. This move creates an opportunity for you and your company if you are looking for highly talented, skilled people.

Here is our number: 1-800-225-HIRE. Please call between 8am and 6pm, Monday through Friday, Eastern Time. We only ask for a minute of your time — or more, depending on your staffing needs. Tell us who you need to make your company run smoother or faster or further or better.

Please have ready all the information on numbers and types of openings, locations of various opportunities, salary ranges, contact names, addresses and telephone numbers.

We will get your requirements to some very special people in the following fields:

Telephone Sales/Marketing
Customer Service
Clerical
Billing and Collections
Data Input

Our employees will contact you directly if they are interested in what you have to offer. We leave the rest in your — and their — capable hands.

It is direct, easy, free, quick — and our way of proving that we want the best for all our employees.

1-800-225-HIRE
MONDAY - FRIDAY 8AM - 6PM EASTERN TIME

AT&T

FMP: 008 (2/88)

Eligible Employee

Receipt of Documents Verification

I acknowledge that I have received the following documents and information:

(check off:)

_____ 1) AT&T Transition Protection Payment Plan and Summary Plan Description

_____ 2) Executive Summary of Force Management Program

_____ 3) FMP "Questions and Answers"

_____ 4) Force Management Separation Election Form

_____ 5) Calculation Instructions and Worksheets

_____ 6) Resource Directory

_____ 7) Career Transition Program Application

_____ 8) Job Access Hotline Brochure

_____ 9) Overview of Benefits Associated with the Force Management Program

10) Pension Information

I am aware of my status in my affected work group.

Signed,

______________________ (Name) ______________________ (Date)

______________________ (Title)

To be given to the manager conducting the meeting.

B. F. Voichick
Manager, Retirement and
Capital Accumulation
Employee Benefits

IBM

International Business Machines Corporation

Old Orchard Road
Armonk New York 10504
914 765 ~~4059~~ 6689

5-13-88

Jim,

Attached are the packages we discussed yesterday.

1 - 1986 RETIREMENT INCENTIVE

2 - Sample "Special Opportunity" package.

I'll be back in my office 5/16

Barry.

IBM Corporate News Bulletin

September 12, 1986

IBM ANNOUNCES 1986 RETIREMENT INCENTIVE

IBM Chairman of the Board John F. Akers has announced a temporary modification of the IBM Retirement Plan, effective today.

The 1986 Retirement Incentive increases the retirement benefit of eligible employees and makes more employees eligible for retirement.

-- To determine retirement eligibility, this incentive will add five years to the actual age and service of all domestic regular and regular part-time employees as of December 15, 1986.

-- To calculate an individual's retirement benefit, five years will be added to the actual age and service on the date of retirement.

To be considered for the Retirement Incentive, employees must be active or on an approved leave of absence today. Those who retired after January 1, 1986, also qualify for this incentive.

Employees must notify their managers in writing by December 15, 1986, of their decision to retire under this incentive. Retirement dates will be determined by a schedule that each division or operating unit will make available to its employees and must be approved by the employee's manager. The schedule will allow retirements to proceed in an orderly fashion while meeting business needs. The final date of retirements will be no later than June 30, 1987.

"The 1986 Retirement Incentive reflects our continuing effort to maintain and improve IBM's competitive strength," said Mr. Akers. He noted that controlling cost and expense is a key contributor to a company's competitive position and will continue to be a focus of attention in IBM.

"In the past year, we've balanced our resources by moving people to work and work to people. We've continued to modernize our manufacturing plants and have retrained people for new jobs. We've cut discretionary expenses and eliminated unnecessary work.

"All of these measures, in addition to the new Retirement Incentive, will make IBM a leaner, stronger -- and ultimately more successful -- company," said Mr. Akers. "And they help us preserve the tradition of full employment."

The Retirement Incentive is being announced today so that employees may begin contemplating their decisions well in advance of the December 15 deadline. During the next two weeks, all managers will attend information sessions on this subject. They then will meet with employees to provide details and answer questions about the incentive. In addition, an explanatory brochure and a personalized retirement benefit estimate will be sent to the homes of eligible employees by the end of September.

9/16 a.m.

International Business Machines Corporation

Office of the Chairman of the Board

Armonk, New York 10504-1783

September 19, 1986

Dear IBMer:

I am writing to tell you about a new--and temporary--retirement opportunity for which you are eligible.

It is called the 1986 Retirement Incentive, and it is part of our continuing effort to make the IBM company as lean and vigorous as possible. As you know, we have taken a number of other measures this year to help us reach this goal. We have moved work to people and people to work. We have reorganized and streamlined organizations, eliminated unnecessary work, and cut discretionary expenses.

Not only is this belt tightening prudent in difficult times such as these, it is essential if we are to remain the leader in one of the world's most competitive industries. When the upturn begins--and I am confident that it will--IBM will emerge stronger and better prepared to compete because of the measures we have taken this year.

Just as a healthy company continually must assess its resources to plan for the future, an individual periodically must take stock of his or her future plans. I would ask you to read carefully the enclosed material. You may want to discuss it with your family.

The 1986 Retirement Incentive offers you a financial and personal opportunity. Retiring under this incentive program may give you a head start on a second career you have been thinking about, or it may be a chance to catch up on some well-deserved leisure.

Whatever your personal goal, I urge you to consider the 1986 Retirement Incentive. It will help IBM remain competitive, and it also helps protect IBM's full employment tradition. It may mean the beginning of a fulfilling retirement for you.

Sincerely,

John F. Akers

John F. Akers

JFA:lmv
Enclosure

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IBM

1986 Retirement Incentive

	IBM Retirement Plan	*1986 Retirement Incentive* *(Based on the addition of 5 years to age and service)*
Current Retirement Income Estimate		
Social Security - Age		
Total		

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IBM CONFIDENTIAL
(when signed)

MEMORANDUM TO: International Business Machines Corporation

I have fully considered the 1986 Retirement Incentive.

I wish to take advantage of this opportunity to receive benefits provided by the IBM Retirement Plan temporary modification upon my retirement from IBM, effective at a date to be determined as described in the announcement.

Requested Retirement Date: ____________________

Date: ____________________ Signature: ____________________

Employee Serial ____________________

This form must be returned to your manager before the end of the decision period.

RETIREMENT SCHEDULE

IF MONTH OF SERVICE ANNIVERSARY IS	SCHEDULED DATE OF RETIREMENT IS
OCTOBER THROUGH JANUARY	OCTOBER THROUGH JANUARY
FEBRUARY THROUGH MAY	FEBRUARY THROUGH APRIL
JUNE THROUGH SEPTEMBER	APRIL THROUGH JUNE

HIGHLIGHTS
1986 RETIREMENT INCENTIVE

What is the 1986 Retirement Incentive?

- It is a temporary modification of the IBM Retirement Plan.

Who is eligible?

- Active domestic regular or regular part-time employees.
- Those on a leave of absence or international assignment.
- 1986 retirees.

How does it work?

- Adds five years to age and service on December 15, 1986, to determine eligibility to retire.
    - You are eligible if:
        - You have 25 or more years of service,
        - You are at least 50 years of age with 10 years of service,
        - You are at least 57 years of age with 1 day of service.
- Adds five years to age and service on retirement date to determine increased benefit.

Example #1

	Current Age:	50
	Service:	25
	Compensation:	$35,000
	Standard Plan	1986 Retirement Incentive
	Not Eligible	Eligible
Annual Retirement Benefit:	0	$11,044

Example #2

Current Age: 55
Service: 30
Compensation: $40,000

	Standard Plan	1986 Retirement Incentive
Annual Retirement Benefit:	$12,621	$16,361

Example #3

Current Age: 60
Service: 35
Compensation: $45,000

	Standard Plan	1986 Retirement Incentive
Annual Retirement Benefit:	$18,406	$21,036

When does this take place?

- —December 15, 1986, is the employee decision deadline under the incentive.
- —Retirement dates will be determined by a company-wide schedule which begins in October 1986 and ends in June 1987. The retirement date must be approved by the employee's manager.

Why was this done?

- —Part of continuing effort to maintain and improve IBM's competitive strength.
- —Balance resources.
- —Offer a financial and personal opportunity.
- —Provide a head start on a second career or the opportunity for additional leisure.

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For Release: IMMEDIATE

International Business Machines Corporation
Armonk, New York 10504

Contacts: Pamela Hawkins
(914) 765-6565
Maxine Yee
(914) 765-6434

IBM ANNOUNCES 1986 RETIREMENT INCENTIVE

ARMONK, N.Y., September 12 . . . IBM today announced a retirement incentive for U.S. employees that makes more employees eligible for retirement and improves the retirement benefit for those electing to participate.

The 1986 Retirement Incentive is part of IBM's continuing efforts to improve the company's competitive strength by reducing costs and balancing resources. It also will help preserve IBM's full employment tradition.

Eligibility for the incentive is determined by adding five years to both the actual age and service record of employees as of December 15 of this year. Employees must notify IBM by December 15, 1986 of their decision to participate and should retire no later than June 30, 1987. The decision to retire under this incentive is voluntary.

At the end of 1985, IBM's U.S. population was 242,241. Its U.S. population is projected to decline by approximately 4,000 during 1986 as a result of normal attrition and limited hiring. With this retirement incentive, along with normal attrition and continued limited hiring, the reduction in the number of U.S. employees in 1987 is planned to be at least twice that of 1986.

# # #

091286 [illegible]

[redacted]

IBM **Corporate News Bulletin**

December 18, 1986

MORE THAN 10,000 EMPLOYEES PLAN TO PARTICIPATE IN THE 1986 RETIREMENT INCENTIVE; ELIGIBILITY TO RETIRE MADE PERMANENT

The 1986 Retirement Incentive was extremely successful. More than 10,000 employees have indicated their intention to retire in 1987.

"IBM owes a debt of gratitude to those employees for their long service and valuable contributions," said IBM Chairman of the Board John F. Akers. "Their cooperation in making the 1986 Retirement Incentive a success takes us one step closer to helping IBM remain competitive in a difficult business environment."

To continue to make early retirement attractive for U.S. employees, IBM today announced that certain provisions of the 1986 Retirement Incentive will continue to apply to employees who were eligible to retire under the incentive, but who elected not to participate.

Employees who were made eligible to retire by the incentive will permanently retain eligibility to retire. In addition, all eligible employees who did not choose to retire under the 1986 Retirement Incentive will receive improved retirement benefits, although less than those available from the incentive. Benefits for those who elected to retire under the incentive are not changed.

Managers may be contacted for additional information about retirement eligibility. Employees not eligible for the 1986 Retirement Incentive are not affected.

IBM also reported today it sees no signs of improvement in its general worldwide business climate as 1987 approaches, and cost reductions and resource balancing actions will continue throughout the company.

12/22 a.m.

228-8

International Business Machines Corporation

Armonk, N.Y. 10504

Office of Vice President

December 10, 1981

Dear IBMer:

I am writing to tell you about a special opportunity which may be of interest to you. It is occasioned by the major reorganization that we recently announced. Realignment of headquarters organizations in lower Westchester County, New York, and Franklin Lakes/Montvale, New Jersey, will require substantial redeployment of people, including a significant number of relocations. Therefore, the company will offer longer service employees, who may wish to leave the company to follow other pursuits, the chance to do so with our assistance.

Any headquarters' employee in the division, group, corporate, or subsidiary headquarters organizations located in lower Westchester County, New York, or Franklin Lakes/Montvale, New Jersey, who will have completed 25 or more years of service by December 31, 1982, and who elects to leave IBM by March 31, 1982, can receive special payments. IBMers whose 25th service anniversary date or eligibility date for early retirement is between April 1, 1982, and December 31, 1982, may delay leaving until their anniversary or eligibility date, if they wish.

The special payments are paid at the rate of 50 percent of the employee's regular salary (based on an annual salary of up to $100,000), for 48 months or until age 65, whichever occurs first, with a minimum payment period of 12 months. These special payments are in addition to whatever benefits the employee would normally be eligible to receive upon leaving the company.

This special opportunity is strictly voluntary. If you wish to take advantage of it, we would like to know by February 26, 1982. You may get further details from your manager.

Sincerely,

W. E. Burdick

W. E. Burdick
Vice President, Personnel

IBM CONFIDENTIAL

MEMORANDUM TO: International Business Machines Corporation

I have fully considered the special voluntary opportunity described in the letter of December 10, 1981.

I wish to take advantage of this opportunity to receive the special payments upon my (retirement/resignation) from IBM, effective ____________________.

Date: __________________________ Signature _________________________

Employee Serial ___________________

IBM CONFIDENTIAL

GENERAL CONFIRMATION LETTER

Dear (Employee):

This letter confirms the understanding that has resulted from prior discussions with you regarding your (resignation/retirement) from IBM.

Effective _______________, IBM will pay you the following special payments per month to be paid on a semi-monthly basis:

From	To	Amount

In the event of your death after the effective date and prior to (ending date of special payments), IBM will continue the special payments to your spouse, if living, or if not, to your eligible dependent children/child under age 23. Otherwise, such payments will cease absolutely on your death.

Very truly yours,

INTERNATIONAL BUSINESS
MACHINES CORPORATION

(Signed-Operating Unit
Personnel Director)

IBM CONFIDENTIAL

NO COMPETE CLAUSE

Dear (Employee):

This letter confirms the understanding that has resulted from prior discussion with you regarding your (resignation/retirement) from IBM.

Effective _______________, IBM will pay you the following special payments per month to be paid on a semi-monthly basis:

From	To	Amount

In the event of your death after the effective date and prior to (ending date of special payments), IBM will continue the special payments to your spouse, if living, or if not, to your eligible dependent children/child under age 23), Otherwise such payments will cease absolutely on your death.

IBM's obligation to continue special payments hereunder is subject to the condition that during this period you will not, without first notifying IBM and obtaining its approval, engage in any activity with, or be employed by, any firm or organization which competes with IBM or its subsidiaries. To ensure compliance with this provision, you agree to notify IBM of any prospective employment you intend to accept during this period.

If the foregoing accords with your understanding, kindly indicate your agreement by dating, signing, and returning the enclosed copy of this letter contract in the envelope provided.

-Very truly yours,

INTERNATIONAL BUSINESS
MACHINES CORPORATION

(Signed-Operating Unit
Personnel Director)

AGREED: ____________________________ DATE: ______________________

IBM Retirement Education Assistance Plan (REAP)

A plan to help prepare for an active and enjoyable retirement.

If you are eligible for the 1986 Retirement Incentive, you are eligible for REAP. The financial assistance that REAP offers toward educational expenses can help prepare you and your spouse for activities and personal fulfillment in your retirement years.

Who can participate?

- Employees within five years of retirement eligibility.
- Retirees for up to three years after retirement.
- Your spouse becomes eligible when you do.

How does it work?

- Reimburses eligible costs upon course completion.
- Maximum lifetime benefit is $2,500 per individual.
- Submit REAP application (ZM02-5431) to the benefits representative at your location prior to enrollment.

What educational expenses are reimbursed?

- Courses at nationally accredited colleges, secondary schools and adult continuing education courses. (Books, tools and optional or noneducational fees are not reimbursable.)
- Course examples:

Real Estate
Sports Instruction
Interior Design
Creative Writing
Musical Instruction
Carpentry
Hotel/Motel Management
Photography
Tax Accounting
Financial Planning
and more . . .

More Information

See the Retirement Education Assistance Plan section of *Planning Your Financial Future.*

1986 Retirement Incentive

Information, Please

This brochure is a first step toward understanding the 1986 Retirement Incentive and the personal and financial opportunities it may offer you.

Your manager has attended a special seminar on this subject so that he or she can answer any questions you may have after reading this material.

In addition, your local benefits department has trained personnel available to answer your questions.

So don't hesitate. Planning for retirement can be a complex business. Take some time to study this brochure and your personalized benefit estimate. The estimate reflects a single life form of payment, not adjusted for such options as Joint and Survivor, income leveling and Pre-Retirement Spouse Option. Reviewing the IBM Retirement Plan section of the "Planning Your Financial Future" booklet will also be helpful. If you have questions, or you're just not sure you understand the 1986 Retirement Incentive, be sure to talk to your manager or call your local benefits department.

The Basics

The 1986 Retirement Incentive is a temporary modification of the IBM Retirement Plan. It increases the amount of the retirement benefit for eligible employees and makes more employees eligible for retirement.

It works like this: to determine your eligibility to retire, the incentive adds five years to your actual age and service as of December 15, 1986. If eligible, your increased retirement benefit will be calculated by adding five years to your age and service on your retirement day.

Advantages for Retirees

If you have already given some thought to retirement, you'll notice right away that the 1986 Retirement Incentive offers financial advantages over the standard IBM Retirement Plan. (See examples on pages 2 and 3.) The larger retirement benefit under the incentive is not just for a year or two—but for the rest of your retired life.

Some of you—especially those made eligible for retirement by the addition of five years to actual age—may never have considered early retirement. You may, however, have had thoughts about a second career. Perhaps you never took these thoughts seriously because of financial reasons. This new retirement incentive may help make such a change possible. Or it may simply give you more time to pursue other interests.

Whatever your personal situation, if you are eligible for this retirement incentive, you have a thoughtful and careful decision to make.

Here are some examples of how the incentive may affect you:

Example 1.

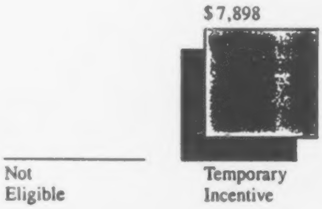
If you are age 50–54 by December 15, there are special advantages. Under the standard IBM Retirement Plan, you would not be eligible to retire unless you had at least 30 years service. Under the incentive, you become eligible with only 10 years of service and your benefit calculation is increased by the addition of five years of service. Under the current plan, a certain amount is deducted from your retirement income calculation because you will receive retirement payments over a longer period of time. Under the incentive, these early retirement reduction factors would be reduced. Lifetime medical benefits would also be extended to you, your eligible dependents or eligible survivors.

Retirement benefit calculations based on retirement as of 12/31/86. This example reflects improvements in the base period announced in May.

	Current IBM Retirement Plan	1986 Retirement Incentive
Age:	50	55
Service:	25	30
Final Pay:	$25,000	$25,000

Service and Earnings Formula

	Based on Actual Age and Service	Based on Incentive
Avg. Earnings in Current Base Period (1977–86):	Not Eligible	$19,500
		X .015
		$292.50
		X 30 Years
		$ 8,775
Early Retirement Reduction:		-10%
Benefit:		$ 7,898 Annually
*With Leveling Option to Age 62:		$10,170 Annually



Note: If you do not retire under the incentive, you will not be eligible to retire for the next five years. In five years when you become eligible you will receive a minimum amount of $6,143 ($8,775 minus 30 percent) instead of $7,898. The 30 percent reduction factor is based on actual age on 12/31/86.

**You may select a leveling option, an adjustment to retirement benefit so when you elect to take Social Security your total retirement income remains about the same.*

Example 2.

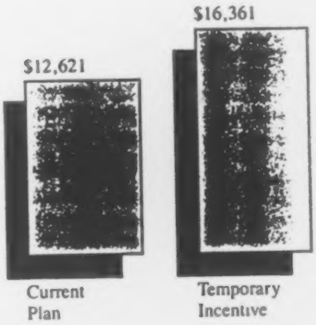
If you are 55–59 by December 15, the retirement benefit is increased in two ways. Your early retirement factors are eliminated by the addition of five years of age. Your retirement benefit is also increased by the addition of five years of service. In addition, the incentive means only 10 years of service are needed (rather than the 15 under the standard plan) to qualify your eligible dependents or eligible survivors for lifetime medical benefits.

Retirement benefit calculations based on retirement as of 12/31/86. This example reflects improvements in the base period announced in May.

	Current IBM Retirement Plan	1986 Retirement Incentive
Age:	55	60
Service:	30	35
Final Pay:	$40,000	$40,000

Service and Earnings Formula

	Based on Actual Age and Service	Based on Incentive
Avg. Earnings in Current Base Period (1977–86):	$31,163	$31,163
	X .015	X .015
	$467.45	$467.45
	X 30 Years	X 35 Years
	$14,023	$16,361
Early Retirement Reduction:	-10%	(no reduction)
Benefit:	$12,621 Annually	$16,361 Annually
With Leveling Option to Age 62:	$16,565 Annually	$20,305 Annually



Note: If you do not retire under the incentive, an early retirement reduction factor of 10 percent will be applied to the $16,361. The minimum benefit at retirement will be $14,725 ($16,361 minus 10 percent.)

Example 3.

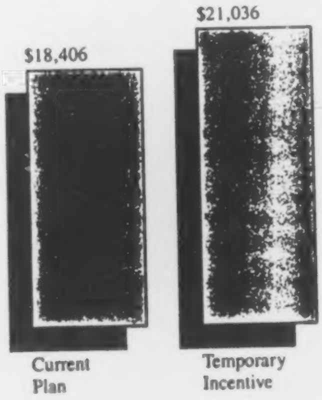
If you are age 60 or over and are eligible to retire, benefits are increased by the addition of five years of service. Early retirement reduction factors no longer apply to you. In addition, the incentive means only 10 years of service are needed (rather than the 15 under the standard plan) to qualify your eligible dependents or eligible survivors for lifetime medical benefits.

Retirement benefit calculations based on retirement as of 12/31/86. This example reflects improvements in the base period announced in May.

	Current IBM Retirement Plan	1986 Retirement Incentive
Age:	60	65
Service:	35	40
Final Pay:	$45,000	$45,000

Service and Earnings Formula

	Based on Actual Age and Service	Based on Incentive
Avg. Earnings in Current Base Period (1977–86):	$35,059	$35,059
	X .015	X .015
	$525.89	$525.89
	X 35 Years	X 40 Years
Benefit:	$18,406 Annually	$21,036 Annually
With Leveling Option to Age 62:	$24,654 Annually	$27,287 Annually



Note: If you do not retire under the incentive, the minimum benefit that will be used to compare against other IBM Retirement Plan calculations will be $21,036.

Keeping that Competitive Edge

At one time, a company's strength was measured by the superiority of its product line. That's still critically important, but it's not the only factor in today's business world.

Today, the top competitor must also be as lean and vigorous as possible. Controlling cost and expense are key to a company's competitive health. The skills and experience needed for a successful future must be balanced with the need for belt-tightening. These are facts of life not only in the information processing industry, but throughout American industry.

Over the past year, IBM has implemented a number of measures to maintain and increase its competitive strength. Resource balancing and the reduction of discretionary expenses are the two you've probably heard most about. The 1986 Retirement Incentive is an additional measure that will help IBM become stronger, leaner, and better prepared to compete in the years ahead. It will also help protect our tradition of full employment.

The Choice is Yours

It's important to note that retiring under the 1986 Retirement Incentive is strictly voluntary. Taking the time to study the information in this brochure and your personalized benefit estimate, or talking with your management, does not in any way commit you to retiring. You may decide that now is not the right time to retire. Or you may decide that it's the perfect time. It's all up to you.

If you are eligible, but choose not to retire under this incentive, you are still entitled to an improved benefit. This is explained in detail in Question 4, which follows.

The only requirement if you do choose to retire under this incentive is that you sign the enclosed form and give it to your manager no later than December 15, 1986. Your retirement date will be determined by a company-wide schedule which begins in October 1986 and ends in June 1987. Your manager must also approve the date selected.

For More Information

The following questions and answers provide details you should know about the 1986 Retirement Incentive. If you have additional questions, your manager or local benefits department will be happy to help.

1. Q. Who is eligible for this incentive?

A. It applies to active domestic regular and regular part-time employees, and those on an approved leave of absence or international assignment on September 12, 1986. Employees who retired after January 1, 1986, also qualify.

2. Q. How do eligibility requirements under this incentive compare with eligibility requirements under the standard IBM Retirement Plan?

A. They are much better. The following chart will help you make a comparison.

1986 Retirement Incentive	Current IBM Retirement Plan
Any age with at least 25 years actual service	Any age with at least 30 years service
At least age 50 with 10 years actual service	At least age 55 with 15 years service
At least age 57 with 1 day actual service	At least age 62 with 5 years service & eligible to receive Social Security benefits
At least age 60 with 1 day actual service	At least age 65 with 1 year service

3. Q. When must I retire to take advantage of this incentive?

A. Retirements for all employees will follow the same schedule. The schedule allows retirement to proceed in an orderly fashion while business commitments continue to be met. Your retirement date within the schedule is determined by your service anniversary month and must be approved by your manager. However, the latest possible date of retirement will be June 30, 1987.

4. Q. Does this modification affect my retirement benefit if I do not choose to retire under the 1986 Retirement Incentive?

A. Yes. If you are eligible to retire under this modification and choose not to retire, your retirement benefit still is recalculated on December 31, 1986,* by adding five years to actual service as of that date. This calculation— which is reduced by early retirement factors for all employees who are under 60 on December 31, 1986*—becomes the minimum amount you may receive on

**The eligibility and acceptance deadline under the incentive is December 15, 1986. Minimum benefits calculated for those who are eligible under the incentive but do not choose to retire are based on actual age and modified service as of December 31, 1986.*

retirement. (This minimum benefit provision is required by current government regulations regarding pensions.)

However, at some point in time, usually between two and three years, normal salary growth and increasing service will cause the minimum benefit to be exceeded by the benefit received under the IBM Retirement Plan. When you retire you will get the greater amount.

If you choose not to retire under this incentive, it is important to note that early retirement reduction factors will reduce the retirement benefit in most cases. (See example 1 and 2.)

Also, if you are under 55 with less than 30 years of service on December 15, 1986, the 1986 Retirement Incentive represents a unique opportunity to retire at an earlier age with less service. If you do not choose to retire under the incentive, you must then wait until your actual age and service makes you eligible to retire under the standard IBM Retirement Plan. (See example 1.)

5. ***Q.*** If I wish to retire under this modification but my manager asks me tc stay longer, how long must I stay?

A. Your manager may ask you to stay on, due to business needs but not beyond June 30, 1987. For example, if the schedule calls for your retirement from February through April 1987 and you wish to retire in February, your manager may ask you to stay until April for compelling business reasons. Any request to stay beyond April 1987 would have to be approved by your unit/division head.

6. ***Q.*** Based on my service anniversary date, the retirement schedule allows me to retire February through April. May I retire earlier than February?

A. If you wish to retire on a date earlier than that specified under the schedule, it must be approved by your division or unit head or designate.

7. ***Q.*** If taking my remaining vacation (earned and/or accrued) puts my retirement date past my scheduled retirement period or date, may I retire at the later date?

A. No. If you elect to retire under this temporary modification, you must retire within the schedule and on a date agreed upon with your manager. You will be compensated for any unused vacation.

8. ***Q.*** Does the addition of five years of age and service affect eligibility for any other benefit such as life insurance, Quarter Century Club or vesting under the Tax Deferred Savings Plan?

A. No. Eligibility for other programs is not affected and continues to be based on actual age and/or service. However, if you retire under the incentive and your modified age and service are at least 55 and 15 respectively, or if your modified service is 30 years or greater regardless of age, lifetime medical and dental benefits will be provided for your eligible survivors. For those of you who don't reach these levels of age and service, eligible survivors will receive one year of medical and dental benefits.

9. ***Q.*** Have any of the basic provisions of the IBM Retirement Plan such as the base period, three formulas to calculate the benefit, Joint & Survivor Option or leveling changed?

A. No. The basic provisions remain the same.

10. ***Q.*** How does the addition of five years to my age under the incentive affect calculations for the Joint & Survivor Option, leveling and Social Security amounts under the minimum benefit formula?

A. The addition of five years of age and service is to determine eligibility and calculate benefits. All adjustments to that benefit, such as leveling, Joint and Survivor Option and Social Security, will be based on actual age.

11. ***Q.*** If I retire under the modification, is it possible to work at my previous job as a supplemental?

A. The key to a supplemental employment arrangement will be needs of the business. Only when a business need exists can you be considered for supplemental employment in either the same or similar assignment. You may also be considered for work in other departments or locations on an individual basis. If hired as a supplemental your retirement and other benefits will continue.

12. ***Q.*** Are all interested employees who retire guaranteed supplemental work?

A. No. Only when a business need exists will employee interest in supplement employment be considered. Your manager can provide you with further details.

13. ***Q.*** I have vested rights and this incentive makes me eligible for retirement. If I do not accept the opportunity to retire is the amount of my vested rights affected?

A. Yes, your vested rights amount at age 65 would be equal to the retirement benefit amount derived from the incentive. If your actual service makes you eligible to receive vested rights at age 55, the amount would be reduced by the normal reduction of 3 percent per year from age 65.

For instance, in the case of the employee in example 1, he would have a vested right amount at age 65 of $8,775, which is the amount derived under the retirement incentive, not reduced for age. As a vested right, it would be subject to reductions of 3 percent per year for each year younger than age 65 the employee chooses to start vested rights payments, down to a minimum vested right at age 55 of $6,143.

UNION CARBIDE

UNION CARBIDE CORPORATION 39 OLD RIDGEBURY ROAD, DANBURY, CT 06817-0001

May 16, 1988

Sonia Fuentes
Congressional Fellow
Senate Subcommittee on Labor
Hart Senate Office Building
Room 608
Washington, DC 20510

RE: Request for Literature on UCC's Early Retirement Incentive Program (VSP)

Dear Ms. Fuentes:

Based on your telephone request, I've enclosed some material which further describes the subject program:

1. Outline of the program.
2. "Q&A's" distributed to Benefit Plan Administrators to be used in discussions with employees about their benefits under VSP. Note Question No. 33, in which we state we plan to protest any state unemployment awards.
3. A copy of the release signed by employees who chose to sever/retire under VSP.

I was unable to obtain a copy of the actual brochure provided to employees, but it mirrored the information presented in the outline (#1).

I hope this will be of some assistance to you.

Sincerely yours,

L. H. Reiter, PB

L. H. Reiter
Consultant Benefit
Plans

pb
att
1319B

UNION CARBIDE
EMPLOYEE
NEWS
BULLETIN

ANNOUNCEMENT

DANBURY, Aug. 28 -- The Company announced today a Voluntary Severance Program (VSP) for U.S. salaried employees in designated units where, because of organizational or operating changes, the number of people is expected to exceed the number of jobs available.

The Program includes:

1. A "3+3 Addition" to the Pension Plan, which will add three years of Company Service Credit and three years of age to the actual Service Credit and age for:

   - determining eligibility to retire,

   - calculating pension benefits,

   - determining eligibility for a vested pension benefit.

2. The payment of a Severance Allowance.

3. Up to six months of continued participation in the medical and life insurance plans for persons not eligible for retirement benefits.

4. Payment of 1986 vacation even if severance is prior to 12/31/85.

5. Outplacement service if requested.

Employees in the designated units will be informed of their eligibility in the near future.

CORPORATE EMPLOYEE RELATIONS DEPARTMENT
DANBURY

VOLUNTARY SEVERANCE PROGRAM - VSP
"3+3 + SEVERANCE PAY

The purpose of VSP is to secure a reduction in force within a designated unit by providing an incentive for eligible salaried employees to volunteer for severance from employment. An eligible employee is one within a specified category employed within the designated unit.

ELEMENTS OF VSP

"3+3 Addition"

For employees accepting the VSP offer, three years of Company Service Credit and three years of age will be added to the actual age and service used for determining pension eligibility and benefits, including eligibility for vesting.

Effect of "3+3 Addition"

- Eligibility for retirement will be attained at age 47 with at least seven years of Company Service Credit at the time of severance.
- Three years will be added to the Company Service Credit used in calculating the pension benefit of each employee accepting the VSP offer who has at least seven years of service or is at least age 62 with one month of Company Service Credit.
- Three years will be added to the actual service credit and age in determining eligibility for retirement with an unreduced pension. Therefore, eligibility for an unreduced benefit will be:
  a) Age and service total 79 or more
  b) Attainment of age 59 with at least seven years of Company Service Credit.
  c) Attainment of age 62 with at least one month of Company Service Credit.

- Actuarial reductions for reduced pension benefit will be computed after the addition of three years to both the actual age and actual service. The reduction will be 5% for each year (prorated at 5/12 of 1% per month) short of normal eligibility for an unreduced pension; i.e., age 62 with ten years' service, age 60 with 30 years' service, and age-and-service totalling 85.

Example: Age 53 with 26 years' service
Usual Reduction:
Six years short of 85 eligibility
6 x 5% = 30% reduction
"3+3" Reduction: Age 53 + 3 = 56
Service 26 + 3 = 29
Total 85
No Reduction

(See attached table for complete schedule of factors.)

- Eligibility for a vested pension benefit will be seven years of Company Service Credit at time of severance.

Benefit Plan Participation

- Individuals electing to retire under the VSP offer may continue medical and life insurance under same terms and premium arrangements as they may apply either now or in the future to other retirees.
- Individuals not eligible to retire may continue medical insurance and life insurance (without disability provisions) for six months or until eligible for coverage by another group plan if earlier under same terms and premium arrangements as they may apply either now or in the future to other retirees.

- Individuals terminating under VSP will be paid for all unused accrued vacation plus 1986 vacation, regardless of severance date.

Severance Payments

- Individuals terminating under VSP will receive a severance payment in accordance with the following schedule:

COMPANY SERVICE CREDIT	SEVERANCE ALLOWANCE
Completed Years	
Up to 3 years	1/2 month's pay
3 years and under 5 years	3/4 month's pay
5 years and under 7 years	1 month's pay
7 years and under 10 years	1-1/2 month's pay
10 years	2 month's pay
Over 10 years	2 month's pay plus 1/4 month's pay for each year of Company Service in excess of 10. (Pro-rated for partial years in excess of 10)

Payment will be made at the regular salary rate on the regular paydays.

VSP Coverage and Limitations

- Available for use in a designated unit with both non-exempt and exempt salaried employees subject to the following limitations:
  1) A defined surplus of people exists
  2) The approval of the Group President
  3) The concurrence of Corporate Industrial Relations
  4) An analysis of the demographics of the designated unit to insure that in both offering and acceptance there will be a wide range of salary levels and no disparate representation in age, sex or minorities.
- The designated unit will function with fewer employees at the conclusion of VSP.
- The offer/acceptance period will be at least one month, but will end no later than December 31, 1985.
- The date of retirement/severance will be specified by the Company but will be no later than December 31, 1985; except in rare-and-unusual circumstances approved by the Group President with the concurrence of Corporate Industrial Relations.
- Elections will be entirely voluntary by the eligible employees.
- Outplacement assistance will be available if requested by the employee.
- The Company retains the right to keep the skills necessary to maintain the business.

8/28/85

0020

TABLE I

% OF FULL PENSION PAYABLE

"3 + 3" VS. REGULAR
UPPER LINE - VSP   LOWER LINE - REGULAR
YEARS OF SERVICE

Not Eligible Without VSP: ages 47, 48, 49

AGE	10-18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35 & OVER
47	40	40	40	45	50	55	60	65	70	75	80	85						
48	45	45	45	50	55	60	65	70	75	80	85	90	95					
49	50	50	50	55	60	65	70	75	80	85	90	95	100					
50	55	55	55	60	65	70	75	80	85	90	95	100	100	100	100	100	100	100
	40	45	50	50	50	50	50	50	55	60	65	70	75	80	85	90	95	100
51	60	60	60	65	70	75	80	85	90	95	100	100	100	100	100	100	100	100
	45	45	50	55	55	55	55	55	60	65	70	75	80	85	90	95	100	100
52	65	65	65	70	75	80	85	90	95	100	100	100	100	100	100	100	100	100
	50	50	50	55	60	60	60	60	65	70	75	80	85	90	95	100	100	100
53	70	70	70 50	75	80	85	90	95	100	100	100	100	100	100	100	100	100	100
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	65	65	65	65	65	65	70	75	80	85	90	95	100	100	100	100	100	100
56	85	85	85	90	95	100	100	100	100	100	100	100	100	100	100	100	100	100
	70	70	70	70	70	70	75	80	85	90	95	100	100	100	100	100	100	100
57	90	90	90	95	100	100	100	100	100	100	100	100	100	100	100	100	100	100
	75	75	75	75	75	75	80	85	90	95	100	100	100	100	100	100	100	100
58	95	95	95	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100
	80	80	80	80	80	80	85	90	95	100	100	100	100	100	100	100	100	100
59	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100
	85	85	85	85	85	85	90	95	100	100	100	100	100	100	100	100	100	100
60	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100
	90	90	90	90	90	90	95	100	100	100	100	100	100	100	100	100	100	100
61	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100
	95	95	95	95	95	95	100	100	100	100	100	100	100	100	100	100	100	100
62-64	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100
65	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100

SUGGESTED TRANSMITTAL LETTER FOR BROCHURE

To:

Your (Department, Section, etc.) has been designated as one of the units to be included in the Voluntary Severance Plan (VSP). You are therefore one of the people eligible for the Plan.

The attached brochure describes this Plan in some detail. I urge you to read it carefully.

On ____________ at ____________ in ____________ we will hold a meeting at which the Plan will be discussed, and at which you may ask questions. Please try to attend.

The Plan offers unique opportunities for those who wish to avail themselves of it. It deserves your thoughtful consideration. If you would like to dicuss it on a personal basis, either before or after the meeting on ____________ please let me know.

Very truly yours

TO: Union Carbide Corporation

I have been fully informed of the Corporation's offer to me to participate in the Voluntary Severence Program as outlined in the brochure The Voluntary Program (VSP), dated September, 1985.

☐ Yes, I have decided to elect to participate in and receive the benefits of VSP by voluntarily severing my employment as provided by VSP.

☐ No, I have decided not to participate in and receive the benefits of VSP.

____
Signature

____
Date

Please complete the form and return to________________________,

no later than ____________________.

V S P - "3+3 AND SEVERANCE"

QUESTIONS AND ANSWERS ON PROCEDURE

1. Q. Where may VSP be used?

   A. In any designated organizational unit, where such unit will function thereafter with fewer employees. A unit could be as large as a division/component, location, or small as a departmental unit or functional part thereof.

2. Q. Who is an eligible employee?

   A. Any salaried employee within any unit where VSP has been approved for use.

3. Q. May VSP be offered to a single, identifiable employee?

   A. In general, no. However, for example, if a single employee is to become surplussed because the employee's job is to be eliminated, VSP may be offered to that employee after necessary approvals.

4. Q. May VSP be used on a limited basis within an selected unit?

   A. Yes, in several ways:

   - A cap on the number of personnel allowed to take VSP may be used. If so, and VSP is over-subscribed, then Company Service should be the factor used in determining eligibility.
   - It may be used only for exempt or only for non-exempt personnel, but this is not recommended.
   - You may single out an identifiable part of a unit, i.e., a function.

5. Q. What approvals are required?

A. Group President and Corporate Industrial Relations

6. Q. Is this an ongoing program?

A. No. It is a time limited program designed to assist units in reducing forces - where necessary, and available only to the end of 1985.

7. Q. If an eligible employee declines VSP and is later declared surplus, will the VSP benefits be available to such an employee?

A. No.

8. Q. If a component declines to use VSP, but surpluses employees, is VSP available to those employees?

A. No. Only the regular benefits are available when a reduction-in-force takes place; i.e., the usual pension benefit plus lay-off allowance.

9. Q. Will VSP be publicized to all employees, including those not eligible?

A. Yes, but only in a general way.

10. Q. Should an employee be advised that if he or she declines VSP he or she may be subject to layoff?

A. If a reduction-in-force is going to take place within a component, and a surplusing will occur if the VSP does not create a sufficiency, it is strongly advised that the employees in that component be so advised (as a group) concurrently with the announcement of VSP.

11. Q. Can an employee rescind an election or rejection?

A. Yes, if done before the end of the offering period of that group.

VSP - Process

Additional Q & As

12. Q. Will this program cover employees who are voluntarily retiring between Sept. 1st and Jan. 1st, 1986?

A. We do not wish to interrupt the flow of voluntary retirements. Thus, any such employee who retires between Sept. 1, 1985 and Jan. 1, 1986 (an employee's effective date of retirement is the first of the month after the last day of work), who would have been included in a VSP offering, if they had remained active rather than retire during this period, will have their pension benefits improved retroactively as provided by VSP, as well as other VSP benefits for which they would have been eligible.

13. Q. May employees selecting VSP defer their pension?

A. Yes, and it will not affect their VSP benefits. For those VSPers deferring pension, the "3+3 Addition" will apply at the time the pension benefit begins.

14. Q. Will the pension bridge apply in VSP?

A. No. VSP is a voluntary action. The bridging for pension applies only in non-voluntary situations -- by the action of the Company.

15. Q. For those VSPers who are not eligible to retire, how will they pay for their share of continued life insurance and medical insurance?

A. They will be billed monthly.

16. Q. Is the Dental Expense Assistance Plan continued under VSP?

A. No. The Dental Plan terminates on the last day of the calendar month in which employment stops. If a previously covered individual is receiving dental care or treatment prescribed by a dentist before that date, benefits according to the schedule will still be payable for services performed for up to 31 days.

17. Q. Does the 3+3 Addition apply to vacation pay or severance pay?

A. No. The 3+3 Addition applies only to pension eligibility and in the calculation of a pension benefit.

18. Q. When will the vacation pay be paid?

A. Any vacation pay due, i.e., current year vacation, carried forward vacation (bank vacation) or 1986 vacation will be paid in the year of last day of scheduled work. Thus, if a VSPer's last day of scheduled work is in 1985, then such vacation pay will be paid in 1985 and will be a part of 1985 earnings.

The income tax withholding for such vacation pay will only be at the 20% level. Thus, such employees should consider filing an estimated 1985 tax return. Such filings can be no later than January 15, 1986.

19. Q. What are the income tax ramifications of the Severance Pay?

A. The Severance Pay is subject to taxation as ordinary income in the year in which it is received. Income tax will be withheld at the individual's regular withholding rate.

20. Q. Is the Severance Pay subject to "Social Security Tax"?

A. Yes. There is a question, however, in which year or years it is subject to such taxation. We are seeking an IRS ruling on this question and will so inform you when we have that ruling.

21. Q. Are employees on leave of absence eligible for VSP?

A. This answer is predicated upon a VSP offering within the designated unit from which an employee is on LOA. There are several different types of "leaves of absence":

- If an employee is on disability leave, i.e, absent because of illness or injury, such an employee would be eligible for a VSP offering -- even if absent because of the disability during the offering period.
- If an employee is on a leave-of-absence for personal reasons, union service, or in the Company's business interest, they will be eligible for VSP only if they have returned from the LOA during the VSP offering period.

23. Q. May VSP be offered to any salaried employee in a designated organizational unit?

A. Yes, except to members of Senior Management.

24. Q. Can IAs be included in VSP?

A. If they are on the U.S. payroll.

25. Q. What about area component?

A. If they wish such a program, they should develop a proposal and submit it for approval.

26. Q. Can the Severance Pay be treated as "Earnings" for an IRA contribution?

A. In the opinion of our counsel, based upon a ruling from the IRS, they cannot.

27. Q. Will the addition of three years to my age also apply to the survivor benefit factor?

A. No. The actual ages of you and your named survivor will be used.

28. Q. Will the three-year addition to age affect the Social Security offset when the 1.5% pension formula is used?

A. No. The offset will be based on your actual age.

29. Q. Will the three-year addition to age affect the level-income calculation?

A. No. It will be based on actual age.

30. Q. Will the addition of three years to the service be used in computing the severance payment?

A. No. Actual service will be used.

31. Q. If death occurs before the severance payments are completed what happens?

A. Any remaining payments will be paid in a lump sum to the individual's estate.

32. Q. If the total of age and service is more than 79, can the "excess" age (up to 3 years) be used in the pension multiplier?

A. No. The only addition to the multiplier is three years of service. If age and service total 79 or more, the age is irrelevant for purposes of VSP.

33. Q. Will people electing VSP be eligible for unemployment benefits from the state?

A. The separation will be reported as being voluntary, which ordinarily is a disqualification. The final decision, of course, is made by the state. However, the Company plans to protest any awards.

34. Q. Can the Severance Pay be made in a lump sum?

A. No. It must be paid at the regular salary rate.

35. Q. Does the addition of three years of service apply to the calculation of the amount of retired life insurance?

A. No. Only active service is used.

36. Q. Why doesn't the "3+3" eligibility apply to the "48-and-8", rather than "50-and-ten" since this is "by action of the Company"?

A. The Program is offered by the Company, but the individual volunteers for separation in order to receive the special benefits. Therefore, it is not "by action of the Company".

37. Q. If I go to work someplace else, will it affect my severance payments?

A. No. Your severance payments will continue even if you have full time employment. The only exception is that they will end if you return to employment with Union Carbide.

JOSEPH S. PERKINS
CORPORATE RETIREMENT MANAGER

CORPORATE BENEFITS ADMINISTRATION

POLAROID CORPORATION
575 TECHNOLOGY SQUARE (4B)
CAMBRIDGE, MA 02139
PHONE: 617-577-2251

[redacted]

[redacted]

PSP-3

POLAROID SEVERANCE PROGRAM CHECKOUT LIST

(VOL)

Name ____________ Clock # ______ Dept. # ______ Term. Date ______

Mailing Address ____________

THE FOLLOWING BENEFITS HAVE BEEN EXPLAINED TO ME:

	CHECK ONE			COMMENTS
	YES	NO	N/A	
1. **SEVERANCE PLAN OPTIONS AND DEDUCTIONS**				
Severance Pay Option			▨	
Medical Insurance				
Dental Insurance				
Life Insurance — Basic				
Life Insurance — POGLIP				
Life Insurance — FOGLIP				
2. **POLAROID PENSION PLAN - "PA" FORM** (Applicable For Employees 55 And Older)				
3. **POLAROID PROFIT SHARING - "TR" FORM**				
4. **POLAROID STOCK OWNERSHIP PLAN FORM**				
5. **LONG TERM DISABILITY**				May not be continued. If currently disabled, you may still apply for LTD after completing the I year waiting period.
6. **POLAROID CONFIDENTIAL INFORMATION FORM** (Dept. Manager Responsibility)				

I agree that I am voluntarily terminating my employment with Polaroid. I understand there are no recall nor rehire rights in this plan. Consideration for rehire would require that I reapply as a new applicant and that there is no guarantee of re-employment. If rehired, there will be no seniority restoration.

I understand and agree to statements on above items.

Employees Signature ____________ Date ______

Personnel Administrator's Signature ____________ Date ______

DISTRIBUTION WHITE—Personal Administration CANARY—Originator PINK—Corporate Benefits Office · 750M-28 HR-224

POLAROID SEVERANCE PROGRAM

Polaroid

Published By: Polaroid Corporation
Corporate Personnel
April, 1985

POLAROID SEVERANCE PROGRAM

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POLAROID SEVERANCE PROGRAM

KEY FEATURES OF THE POLAROID SEVERANCE PROGRAM

Introduction

The purpose of this Polaroid Severance Program is to achieve a reduction in worldwide payroll and benefits of twenty-five to thirty million dollars, which will be accomplished through divisional restructuring and the projected elimination of approximately 400 salaried jobs and a smaller number of hourly jobs.

The program is aimed at improving our financial performance and is not intended as a benefit. In many cases, management will encourage individuals to seriously consider the severance program.

Eligibility

The Polaroid Severance Program applies to all permanent full or part-time Company members who are on the active payroll, but not all members will be eligible to participate. Division management will determine the eligibility of a member and to participate you must receive specific written approval to leave from your Senior Corporate Officer.

Hourly Members - Decision to participate in this plan is voluntary. Division Management will, however, limit the number of participants allowed to leave from the Division, or from one or more particular job families and/or classifications within the Division, where appropriate.

Salaried Members - Any salaried member may request to participate in this plan, but eligibility will be determined by division management. Participation may be involuntary for some members with under 10 years of salaried seniority, in which case the severance payment structure will be as stated in this Polaroid Severance Program description.

Timetable

If you are deemed eligible by your division management and are interested in taking the program, you must let your supervisor know on or before July 12, 1985. The latest date for termination of your employment is July 19, 1985.

Exception:

Salaried Members with less than 10 years salaried seniority and no prior hourly experience, for whom this program may be involuntary will be notified on or about May 1, 1985; the termination date for those members will be on or about May 31, 1985.

Salaried Members with less than 10 years salaried seniority and who have prior hourly experience, have until July 12, 1985 to decide whether to leave the Company or to re-enter the hourly ranks.

Severance Pay Provision

Amount of Payment

Severance payments will be based on your

- Company seniority as of July 19, 1985, as recorded on your PEP document (unless you had a break in service, in which case you will be given credit for your service prior to the break), and
- age as of July 19, 1985, and
- pay rate on July 19, 1985.

Payments will be based on base pay only. They will not include overtime, shift premiums or bonus.

The following is an approximation of benefits:

AGE	SEVERANCE PAY
Under age 45	1 month's pay for every 2 years of seniority.
45 - 49 years	Between 1 and 2 month's pay for every 2 years of seniority, depending on age.
50 and over	1 month's pay for every year of seniority.

The maximum payment available under this program is 30 months of full pay.

Form of Payment

You have the choice of receiving your severance payment in one of several forms, as outlined below. More specific details of these options and how they would apply to you will be available through your division Personnel office on or about May 1.

PLEASE NOTE: THE CHOICE ON FORM AND TIMING OF SEVERANCE PAYMENT MUST BE MADE BEFORE YOU TERMINATE AND THAT CHOICE IS IRREVOCABLE. NO CHANGES IN FORM OR TIMING OF PAYMENT MAY BE MADE AFTER YOUR TERMINATION.

1) A full month's pay each month for the designated payment period. (There will be no interest growth on this type of payment.)

2) A single lump sum payment equal to the amount of money Polaroid would need to set aside today in order to meet its severance obligations to you, which is an amount that is discounted at 7%.

3) Installment payments based on the discounted lump sum. (7% interest growth per year will be applied to these payments.) If you are under age 65, you may choose to have monthly payments made for as long a period as you want, but not beyond age 67. If you are age 65 or older, you may choose to have monthly payments for a period not to exceed two years after termination.

4) For members with a salary of $50,000 or higher, a lifetime annuity. This annuity is based on the discounted lump sum and will provide a monthly income for life, with or without survivor options. (7% interest growth per year will be applied to these payments.)

5) Deferral of severance payment to a later date up to, but not beyond, age 67. This severance payment will be based on the discounted lump sum. The year you want your payments to start and the method of payment that you want at the end of the deferral period must be selected before you terminate and those choices are irrevocable. (7% interest growth per year will accrue during the deferral period.)

PLEASE NOTE: PERIODIC AND DEFERRED PAYMENT PLANS REPRESENT A PROMISE BY POLAROID TO PAY AND POLAROID HAS EVERY INTENTION OF MEETING ITS OBLIGATION. HOWEVER, THESE PAYMENTS WILL NOT BE INSURED OR OTHERWISE SECURED.

Career Decision Workshops and Outplacement Services

Drake Beam Morin Inc., one of the country's finest career counseling and outplacement firms, is consulting with Polaroid to provide professional Career Decision Workshops for all employees eligible to participate in the Polaroid Severance Program. In addition, once an employee has agreed to leave, Outplacement Services will be available.

The Career Decision Workshops will offer eligible employees the opportunity to evaluate their skills, abilities, talents and experience in relationship to other possible employment. The workshops will also offer information on effective decision-making and individual counseling.

Outplacement Services, available once an employee has agreed to leave, will offer workshops on how to find other full or part-time employment or on starting your own business and/or consulting and additional support services.

Regular Retirement Benefits

You will be entitled to whatever benefits Polaroid's retirement plans normally provide, as well as severance payments. Sessions will be held to give you considerably more detail on your Retirement Benefits, but a brief summary follows.

Under Age 55:

You are immediately entitled to your benefits under the Profit Sharing Retirement Plan and can choose among the various payment options provided by the Plan, including deferral to age 70.

If you have 10 or more years of vested service, your Pension benefit will begin when you reach age 65, or you may arrange for it to begin on a reduced basis as early as age 55. If you have less than 10 years of vested service, there is no benefit for you under the Pension plan.

At Age 55 or Older:

You are immediately entitled to your benefits under the Profit Sharing Retirement Plan and can choose among the various payment options provided by the Plan including deferral to age 70 or payment as an annuity.

Your Pension benefit, which will be reduced 3% for each year you are under age 65, will be effective as of the month following your termination. (It will, however, take a few months for your Pension benefit to be calculated and for the first payment to arrive.)

OTHER BENEFITS

Medical Insurance

Under age 55:

You may continue your medical insurance coverage for yourself and family members, if applicable, for up to two years by continuing premium payments. The premium will be the same as for an active employee. Should you obtain medical coverage through another employer, your Polaroid coverage will cease.

Age 55 or Older:

If your age plus seniority equals at least 65, you can continue your regular medical insurance coverage for yourself and family members, if applicable, until age 65, by continuing payments. Your payment will be the same as for an active employee. Upon reaching age 65, you can become eligible for Medicare (a government-sponsored benefit) and for a cost-free Polaroid medical benefit that supplements Medicare; or remain under the regular medical insurance for the remainder of the two-year insurance continuation period, by continuing payments at the active employee rates.

The combination of Medicare and Polaroid's supplemental medical benefit will continue for life and will provide a level of coverage similar to the level provided for active employees. However, please make a note that you must apply for Medicare benefits just prior to your 65th birthday. The same is true of your spouse if you are married.

If you are employed elsewhere and have medical coverage, the above coverage will still apply, but benefits will be coordinated between the two plans so that jointly you collect up to, but not more than, 100% of allowable expenses.

If your age plus seniority does not equal 65, then your medical coverage will be the same as for members under age 55. See previous section.

Dental Insurance

You may continue your dental benefits for yourself and your family members, if applicable, for up to two years by continuing premium payments. The premium will be the same as for an active employee.

Should you obtain dental coverage through another employer, your Polaroid coverage will cease.

Life Insurance

You may continue your group life insurance coverage for up to two years by continuing premium payments. The premium will be the same as for an active employee. This privilege is for Basic Group Life Insurance, Optional Group Life Insurance, and Family Life Insurance, provided you are carrying these insurances on the day you leave.

If you are age 55 or older, and your age plus seniority equals at least 65, you have a choice regarding the life insurance provisions above. You can choose to maintain full life insurance coverage, as above, through premium payments for two years, and then transfer to Polaroid's lifetime, cost-free Life Insurance Group for retirees. Or, you can choose to transfer to the retiree Life Insurance Group as of your termination date and discontinue any optional Polaroid insurances you presently carry.

Coverage under the cost-free Retiree Life Insurance Plan is:

$10,000	Coverage for 1st year after termination
$ 8,000	Coverage for 2nd year after termination
$ 6,000	Coverage for 3rd year after termination
$ 4,000	Coverage for 4th year after termination
$ 3,000	Coverage for life

If you are not a Polaroid Group Life Insurance Plan participant, and you are age 55 or older and age plus seniority equals at least 65, you will be covered for a flat $3,000 of life insurance as of the date you leave, at no cost to you.

Special Note:

If you attain age 55 within the time it would take to collect your total Severance pay in full-month payments and your age plus seniority equals at least 65, then you will become eligible for the retiree group insurance and age 55 retiree group medical insurance plans described above. The medical plan provided to you will be whatever is available to active employees, including the same premium schedule paid by active employees. As the medical plan changes for active employees, it would also change for you.

For example, if you were age 54 and entitled to 14 months of full pay, you would meet the eligibility criteria. If you were age 54 and entitled to 7 months of full pay, you would not meet the criteria, even though you could stretch your payment period to be more than 12 months by electing a different payment option.

Long Term Disability

Your coverage in this plan ceases the day you terminate.

QUESTIONS AND ANSWERS

CONDITIONS OF PARTICIPATION

1) What level of review is required to approve my eligibility for the severance program?

Written eligibility approval from your Senior Corporate Officer is required for both hourly and salaried members.

2) Can employees on a Leave of Absence participate in this plan?

Only employees on Specific or Divisional Leaves of Absence can participate. They must receive the required approvals before July 12, 1985 and return to active status by July 19, 1985. Members on Indefinite Leaves of Absence are not eligible to participate.

3) If I don't take the severance program now, can I take it later on?

There are no plans to offer this program again. This plan is being offered only through July 19, 1985. You must notify your Supervisor on or before July 12, 1985 if you are eligible and choose to participate in this program.

4) If I'm interested, can I leave before July 19th?

Yes, you can, if you obtain permission from your division management. However, some departments or divisions may request all terminations be held to July 19th in order to assess the program's impact before letting anyone leave. People who do leave early should expect to wait at least four weeks for severance payments to begin.

5) If I take the severance program and terminate prior to July 19, 1985, do I have up to July 19th to change my mind?

No. Once you have terminated, your decision is permanent.

6) Can I later return to Polaroid?

You have no rights to re-employment. You may make application for work but would only be considered along with all other candidates. You will not be given special preference for rehire.

If you should be re-employed at Polaroid during the period in which you are receiving severance payments, these payments will stop. If you elected a lump sum payment, you would be required to reimburse the Company a proportionate share of that payment. Also, you should be aware that your seniority would not be reinstated if you returned to Polaroid; however, past service would count towards future retirement benefits.

7) Will it be possible for me to return to Polaroid as a per diem, reserve pool, consultant, etc., after I elect the severance program?

It is not the intent of the Company to allow people taking the severance program to return to Polaroid in any capacity.

If an exceptional need develops, notification of the Employees' Committee and approval by the respective Senior Corporate Officer and Vice President of Personnel will be required even for short term arrangements.

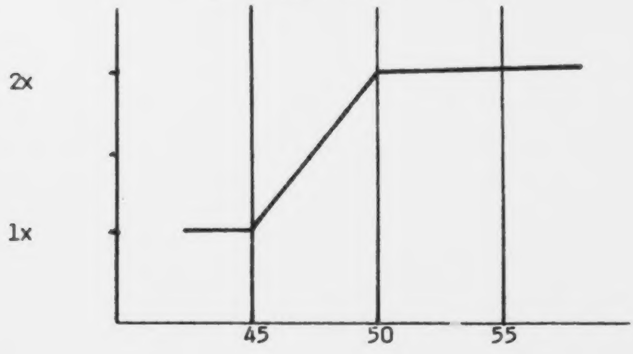
PAYMENT

8) What is the exact formula used to determine the amount of my severance payment?

The actual formula for determining your severance pay follows.

Months of Severance = [1 + 0.2 (Age - 45)] x [Years of seniority ÷ 2]

Where:
(a) MAXIMUM AGE IN FORMULA IS 50 (If over 50, use 50 in formula),
(b) MINIMUM AGE IN FORMULA IS 45 (If under 45, use 45 in formula),
(c) MAXIMUM SEVERANCE EQUALS 30 MONTHS' PAY,
(d) AGE AND SENIORITY ARE EXPRESSED IN DECIMALS TO THE NEAREST DAY.



9) I heard that if I leave early, I still get paid through July 19th. Is that true?

No. You will be paid only through the date that you terminate.

10) If I take the program, when can I expect my severance payments to begin?

If you leave on or near July 19th, your first severance check will take at least 4 weeks and perhaps longer if there is a high volume of terminations. (Severance checks will be issued monthly for all participants, except for those choosing the lump sum option.)

11) Will Polaroid send my severance checks directly to a bank for me?

Yes. Polaroid will direct deposit your checks to a bank of your choice, as long as it is part of the national clearing house system.

12) Can severance payments be paid more frequently than once a month?

No. Severance payments, other than the lump sum, will be paid in monthly checks.

13) What deductions will be taken from my severance checks?

Any money still owed to Polaroid, i.e., camera purchases, expense reports, tuition reimbursements, etc. will be deducted in addition to taxes and insurance premiums. Also, any payroll deductions being made by court order (garnishments) will continue to apply.

14) Will I owe Social Security (FICA) taxes on my severance pay?

Yes, regardless of your age, you will have to pay social security taxes on your severance pay for the duration of your payment schedule.

15) Will any future Pay Scale increases be added to my severance pay?

No.

16) Will Credit Union deductions be taken from my termination check?

No. Arrangements to handle your financial obligations to the Credit Union can be handled by calling your local PCU advisor.

17) What about the vacation I've earned?

You will be paid for any unused vacation days you have earned up to the day you terminate, including your credited 1985 vacation allowance. The latest date permitted for termination is July 19, 1985.

18) What happens to my Tuition Assistance benefits if I'm still in school when I terminate?

Since you will be terminating, you must return the full amount of Tuition Assistance money for the incomplete course(s). It will be taken out of the last check before termination. Tuition Assistance benefits questions should be addressed to the Tuition Assistance Office (222-3559).

19) I have 401K deductions taken from my pay. What happens to this money if I take the program?

401K is part of your Profit Sharing account. Money saved through 401K will be treated the same as your other Profit Sharing money. No contributions to your 401K account will be allowed after you terminate and no contributions to your 401K account will be allowed from your severance payments.

20) Will I have to pay income taxes on my severance pay?

Yes. The Company will withhold FICA (Social Security), federal income taxes, state and local income taxes from your severance check.

21) Will income taxes be withheld from my Pension and Profit Sharing payments?

State and Federal laws now require income taxes to be withheld from Pension and Profit Sharing payments unless the individual requests that no taxes be withheld. You will be able to make this choice during the termination process.

22) Can I roll over my severance payment to my IRA?

No. The severance program is not considered a "qualified plan" like our Profit Sharing Plan or a 401K Plan. According to IRS regulations you may only roll over an account from one qualified plan to another qualified plan.

23) Will I be able to collect unemployment insurance?

It is doubtful, unless you are terminating involuntarily. However, a state agency, not Polaroid, determines eligibility for benefits on an individual basis. Most members who take the severance program will be leaving voluntarily - meaning they could be working and have not been laid off for lack of work - which are two disqualifiers for unemployment benefits.

24) Can I collect Social Security while I am collecting severance payments?

Yes. If you are at least 62 - which is the earliest age you can collect Social Security - you will be eligible to receive Social Security benefits even though you are collecting severance pay. To calculate your benefits, Social Security will look at your age, years of work and your pay up to the date you leave. However, you should note that if you go to work elsewhere, your earnings there may make you ineligible to collect Social Security. Your severance payments would nevertheless remain the same.

25) What happens to my severance payments if I die?

For all payment options except the annuity option, your accrued severance amount remaining as of date of death will be paid in a single lump sum according to the following sequence of beneficiaries:

1. To Spouse
2. If no spouse, to living children in equal shares
3. If no eligible children, to your estate.

If you wish to arrange for a different sequence of beneficiaries, you must do so at the time you choose your method of payment.

If you are eligible for and elect the annuity option, you may select a survivor option or one without such a feature. Consult with your Personnel Administrator for more details.

26) If I take the severance program and I die before I reach age 55, is there any survivor benefit for my spouse under the Pension Plan?

Yes. If you are married and vested for a Pension, there is a survivor benefit provided for your spouse should you die before receiving benefits from the Pension Plan. This survivor benefit would not become effective for your spouse until that point in time you would have reached age 55, if you had lived. (This is not the Survivor Income Benefit insurance available to active employees under our Pension Plan. The S.I.B. stops the day you terminate.)

27) If I take the severance program and then go to work elsewhere - will that affect my severance pay or my pension?

No.

EFFECTS ON BENEFITS

28) If I decide not to continue Polaroid benefits when I terminate, can I later change my mind and obtain benefits, like medical coverage?

If you are under age 55 - no.

If you are age 55 or older and your age and seniority equals at least 65, you may later change your mind on medical benefits only, not other benefits.

29) How will the severance program affect my Pension?

You will not earn any additional benefits in the Pension Plan. Your Pension rights will be the same as any other employee who terminates from the Company.

This severance program will neither increase nor decrease the amount of your Pension; nor will it change any of your options as to when and how your Pension is paid to you. For example, if you are at least age 55 but under age 65 on the day you leave, your Pension will be reduced just as for early retirees.

30) Will the severance program affect my Profit Sharing?

No. You will not earn any additional benefits in the Profit Sharing Plan. You will be treated like any other employee who terminates from the Company.

31) If I take the severance program, will I still have Long Term Disability protection?

No. LTD coverage ceases on your termination date.

32) What happens to my benefits under the Employee Stock Ownership Plan?

Your membership in the Stock Plan will cease and your account paid to you like any other employee who terminates from the Company.

If you are age 55 or older, you will receive a Stock Plan contribution for 1984 and 1985 in addition to the current value of your account.

If you are under age 55, you will receive a contribution for 1984, in addition to the current value of your account.

MISCELLANEOUS

33) After termination under the severance program what obligations will I have with respect to the Agreement I entered into when I was hired concerning inventions, trade secrets and confidential information?

The Agreement provides that inventions relating to the Company's business made by employees during employment and for one year thereafter belong to the Company. It also provides that you may not disclose any of Polaroid's trade secrets or confidential information to any unauthorized person at any time either before or after termination.

34) How will employees who have previous service in Polaroid's subsidiaries participate in the severance program?

Employees who have transferred from subsidiaries will receive termination pay for all service, including subsidiary service.

P.S.P.
4/09/85
Page 14 of 14

35) Is this program being offered worldwide, or just here in the U.S.?

There will be worldwide participation this year in the $25-30 million payroll reduction plan, but this particular plan will be available only to domestic employees.

36) What kind of help is available to assist me in making my decision?

Your supervisor and your Personnel Administrator will provide you with the data you need to start thinking about the severance program. After that there will be two main resources -- programs run by the Retirement Office and programs run by Drake Beam Morin Inc., our outside consulting firm. Your Personnel Administrator will have additional information on both types of resources on request. Spouses are welcome to attend some of these sessions.

37) Can I try the outplacement program up to July 19th and then stay if I don't obtain other employment?

No. Outplacement is not available until you have agreed to leave, and the decision to terminate is permanent. However, for members eligible to take the severance program, Career Decision Workshops will be available prior to termination to aid in the decision-making process.

38) How can I find out more about the severance program?

Over the next few months, we will be making available a variety of communications to eligible members, including the following:

- all eligible members will have the opportunity to have an individual meeting with their Personnel Administrator to go over the details of their income and benefits under the severance program and to ask questions.

- each participant age 55 or over will be assigned a counselor who will set up a one-to-one meeting with anyone interested in pursuing the plan further. This person will be your main resource throughout the severance program period.

- a series of seminars will be offered for eligible members thinking about leaving under this program. The subjects covered will include financial planning and career decision-making. Information on these seminars will be available from your Personnel Administrator. Spouses are welcome to attend.

BOSTON COLLEGE
885 CENTRE STREET, NEWTON, MA 02159

LAW SCHOOL
(617) 552-8550

June 11, 1988

Senator Howard M. Metzenbaum
Subcommmittee on Labor
Committee on Labor
and Human Resources
Washington, D.C. 20510

Dear Senator Metzenbaum:

The Subcommittee on Labor recently held hearings on whether Congress should enact legislation regulating waivers under the ADEA. Although some ADEA waivers occur in the context of traditional settlements of ongoing disputes, which are adequately regulated by the courts, I am particularly concerned about the unique problems raised by the use of waivers in conjunction with retirement incentive programs. As discussed below, I believe that retirement incentive plans can be a form of prospective waiver and consequently must be scrutinized closely under the ADEA.

The ADEA, as a civil rights statute, seeks to alter employer conduct by placing penalties on age discriminatory conduct. Employers know that if they discriminate on the basis of age they may be subject to suit by both the aggrieved party and the EEOC. In most cases the claimed wrongful act has already occurred, and what remains is for the employer and employee to argue about whether that act was discriminatory or how much the employee should be compensated for the wrongful act.

Waivers under retirement incentive programs have a subtle but distinct difference. With retirement incentives the employer often has not yet committed the claimed wrongful act. The employee has not been fired because of his or her age or involuntarily retired, either of which clearly would be a violation of the ADEA. Rather, the employer is often stating that he or she will commit a possible wrongful act if the employee agrees to waive the ADEA's protections. Even a substantial money bonus cannot eradicate the essential nature of this transaction. At its core it is no different from an employer offering to hire an employee on condition that the employee waive his or her right to minimum wage guaranteed by the Fair Labor Standards Act. In both cases the employee may be acting rationally. In both cases the employee may want or need what the employer is offering. And in both cases the employer does not have to offer the bonus or the job. Although these agreements may appear to be simple contracts between consenting parties, Congress has invalided such waivers under the Fair Labor Standards Act as against public policy and certainly should seriously question such contracts under the ADEA. In both examples waivers undermine the important goal of deterring wrongful conduct.

Not all retirement incentive programs are violations of the ADEA. For those programs that do not violate the ADEA the presence or absence of a waiver makes no difference. But retirement incentive programs can violate the ADEA. They may impose undue pressure on the employee, or be targeted to a single employee so that the incentive is not a bona fide retirement plan under §4(f)(2) of the ADEA. The presence of a waiver in these contexts may lead a court to ignore the underlying ADEA violation. In those instances the presence of the waiver undermines the congressional policies embodied in the ADEA. These are the kinds of situations in which the courts and the EEOC must vigilantly examine the underlying retirement incentive to be sure that it does not violate the ADEA.

My particular concern is that the EEOC's rule permitting employees to waive their rights under the ADEA without federal supervision is overbroad. The EEOC rule creates a presumption that "knowing and voluntary" waivers in retirement incentive programs are valid. Although the rule purports to exclude prospective waivers, there is no indication that the EEOC considers waivers in the context retirement incentives a form of prospective waiver. Because of the potential for duress and the possibility that waivers will prevent examination of the underlying employer conduct, with retirement incentives such waivers should be viewed with great suspicion. With the elimination of mandatory retirement, incentive retirement programs will take an even larger role in personnel practices. The EEOC creates too large an opening for abuse by announcing that unsupervised waivers are permitted in all circumstances.

I appreciate the opportunity to submit this letter concerning a very important issue in the area of age discrimination.

Sincerely,

Judith A. McMorrow

Judith A. McMorrow
Assistant Professor
Boston College Law School

IEEE **UNITED STATES ACTIVITIES BOARD**
THE INSTITUTE OF ELECTRICAL AND ELECTRONICS ENGINEERS, INC.
1111 19th STREET, N.W. WASHINGTON, DC 20036-3690, U.S.A. TELEPHONE (202) 785-0017

May 20, 1988

The Honorable Howard Metzenbaum
Chairman, Labor Subcommittee
Senate Committee on Labor and Human Resources
608 Hart Office Building
Washington, DC 20510

Subject: Statement for Record of Subcommittee Hearing, May 24, 1988

Dear Mister Chairman:

As Chairman of the United States Activities Board of the Institute of Electrical and Electronics Engineers, Inc. (IEEE), I appreciate this opportunity to express the concerns of the U.S. members of the Institute about the 1987 rule by the Equal Employment Opportunities Commission (EEOC) to permit unsupervised waivers (i.e., without EEOC supervision or approval) of employee rights under the Age Discrimination in Employment Act (ADEA).

First, a word about the Institute: The Institute of Electrical and Electronics Engineers, Inc. is comprised of more than 293,000 electrical and electronics engineers, some 235,000 of whom reside in the United States. Forty percent of our working U.S. members are employed by large corporations. Thirty-five percent work for medium sized corporations and an additional sixteen percent work for small businesses. The rest are professors or are self-employed. The average age in 1988 of the members of IEEE is forty-four. Thus, over half of our membership is protected by the Age Discrimination in Employment Act.

Since technology moves at such a rapid pace, older engineers are often victims of the stereotype that their knowledge is outdated and their experience is not relevant to state-of-the-art research. Thus, engineers have always been particularly hard hit by age discrimination in employment.

These same engineers are hardest hit when American industry embarks on layoffs and reductions-in-force programs. They are called into corporate offices, hit with the disastrous news and then given only a few days to make decisions that will affect the rest of their lives. They must waive rights at a time when they have little or no idea what those rights might be. How can they know at that point in time whether or not only older workers are being fired or if there is some pattern of discrimination, from which they have recourse, in the actions of the company.

The EEOC assures us that an individual can still file charges under ADEA, even if he or she has signed this waiver. Unfortunately, in these cases the plaintiff must also prove that the waiver signing was not "knowing and voluntary."

Older engineers have recently begun to face the dilemma of early retirement incentive programs. The fact that these programs are based on the theory that the older worker is the most expendable is not lost on them. While the offers of cash and retirement incentives may sound tempting, these offers are usually contingent upon signing the waiver. The threat, real or perceived, is obvious to the employee, but the long term effects of signing the waiver are not.

Concerning the larger issue of blanket unsupervised waivers, we must ask why companies require such waivers if they have dealt with employees in a fair and legal manner. We believe that waivers should be utilized only in special instances where the procedures of the Fair Labor Standards Act are followed, as the ADEA specifically mandates, and that they be thoroughly supervised by the EEOC.

We believe that if the United States is to maintain its preeminent technological position in this world, we must utilize the skills and knowledge of all our engineering professionals. The 235,000 United States members of the IEEE, young and old, are ready to accept this challenge.

In conclusion, the IEEE United States Activities Board commends you and other distinguished members of the Senate Subcommittee on Labor for holding public hearings. We respectfully request your cooperation in working with the Subcommittee, the Congress, IEEE, and other concerned organizations to press for an end of the use of age as a criterion when making employment or personnel decisions, or in matters of compensation or benefits, or any other matters relating to employment. (See attached Position Statements.)

Thank you.

Sincerely,

Edward C Bertnolli

Edward C. Bertnolli
Chairman, United States
Activities Board

ENTITY POSITION STATEMENT

AGE DISCRIMINATION BY EMPLOYERS OF ENGINEERS

The [illegible] of Electrical and Electronics Engineers, Inc.
1111 19th STREET, N.W. WASHINGTON, DC 20036-3690
(202) 785-0017

It is the position of the United States Activities Board that engineers:

- * are important resources to modern technologically oriented enterprises.
- * employ their knowledge and experience to improve the quality of life.
- * have acquired an education and of necessity must continue technical training to maintain their education current throughout their careers.
- * seek varied and challenging problem-solving opportunities, which make them a unique asset among employees.
- * possess unique traits, skills and analysis/synthesis capabilities that are not widely distributed among the universe of employable persons.
- * who maintain their technical capabilities become more valuable with age because of their experience.
- * deserve an opportunity to pursue lifetime careers in engineering and should not be underutilized as technicians.

United States Activities Board
Approving Entity

11/17/82
Date

It is the position of the United States Activities Board that employers of engineers:

- should refrain from all practices of age discrimination, including dismissal because of age, demotions because of age, failure to promote because of age, failure to hire because of age, unfair salary practices related to age.
- should be sensitive to their obligations to their human resources on which the destinies of the enterprise depend.
- should manage in a manner that would motivate all engineers regardless of age towards high productivity and high morale.
- should provide equal opportunity to all age levels of engineers to receive continuing education and training through formal courses and challenging assignments.
- should give proper recognition and promotions based on merit, regardless of age.
- should recognize that experience acquired during a career has considerable value to the enterprise.

IEEE POSITION PAPER

AGE DISCRIMINATION

The Institute of Electrical and Electronics Engineers, Inc.
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(202) 785-0017

Engineers consistently have demonstrated their ability to improve the quality of life for all inhabitants of the world. Engineers who employ the forces and materials of nature for the benefit of society are vital to the process of improving the quality of life for all peoples. The continued development of old technologies and the infusion of new ideas to produce new technologies require superior intellectual ability and experience in engineering and, therefore, need highly sophisticated, ingenious people. This high level of capability and ingenuity on the part of engineers is achieved in part through formal education but, more important, through experience in dealing with technical problems. Thus, as an engineer gains experience, he or she should grow in technological stature as well. They should become more valuable to society as they grow older, and a vast bulk of the engineers of the world do just that.

Employers of engineers have the obligation to provide a work environment that fosters the engineer's growth in technological stature of engineers through job assignment, formal and informal education opportunities and through professional and technical peer contact.

Engineers have the obligation to continue to grow in their professional dimension through study, participation in technical conferences and meetings, and utilization of open and inquiring technical minds to solve problems facing society. Engineers who do continue to grow in their ability to solve society's problems should have the opportunity to exploit that expertise as they increase in age.

IEEE notes, however, some evidence that indicates that some industries in a rapid technologically changing environment are prone to display bias against older engineers. The IEEE is as opposed to discrimination because of age as it is against other forms of discrimination since biases of any nature, including those of age, are inimical to society's best interests and those of the engineer. The IEEE calls upon industry, government, and educational institutions to examine their practices to assure the profession that such age biases do not exist in their endeavors. The IEEE, in turn, will make every attempt to prevent age bias from existing and encourages the adoption of programs by all employers of electrical and electronics engineers to ensure the efficient, proper and humane utilization of experienced, middle-aged and older engineers.

(Reaffirmed by the IEEE Board of Directors on 2/20/87)

IEEE Board of Directors	9/18-19/75
Approved	Date

Senator **METZENBAUM**. The hearing stands adjourned.

Thank you very much.

[Whereupon, at 11:40 a.m., the subcommittee was adjourned.]

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